(10)

No. 92-486-CFX
Status: GRANTED

Title: United States and Federal Communications Commission, Petitioners
v.
Edge Broadcasting Company, t/a Power 94

Docketed:
September 17, 1992

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Shumadine,Conrad M., Souza,Wayne G.

8-5-92 ext til 9-17-92, C.J. Rehnquist, CITED.

Entry	Date	Note	Proceedings and Orders
18	Mar 5 1992		SET FOR ARGUMENT WEDNESDAY, APRIL 21, 1993. (2ND CASE).
1	Aug 4 1992	G	Application (A92-97) to extend the time to file a petition for a writ of certiorari from August 18, 1992 to September 17, 1992, submitted to The Chief Justice.
2	Aug 5 1992		Application (A92-97) granted by the Chief Justice extending the time to file until September 17, 1992.
3	Sep 17 1992	G	Petition for writ of certiorari filed.
4	Oct 13 1992		Waiver of right of respondent Edge Broadcasting to respond filed.
5	Oct 14 1992		DISTRIBUTED. October 30, 1992
6	Oct 23 1992	P	Response requested -- JPS. (Due November 23, 1992)
8	Nov 23 1992		Brief of respondent Edge Broadcasting Company in opposition filed.
7	Nov 24 1992		REDISTRIBUTED. December 11, 1992
10	Dec 7 1992	X	Reply brief of petitioners filed.
9	Dec 14 1992		Petition GRANTED.
			**********
11	Jan 19 1993		Brief of petitioners United States and FCC filed.
12	Jan 19 1993		Joint appendix filed.
13	Jan 27 1993		Record filed.
		*	Original proceedings U.S.Court of Appeals, Fourth Circuit and U.S.District Court, Eastern Dist.Virginia (1 Box)
14	Feb 19 1993		Brief amici curiae of National Association of Broadcasters, et al. filed.
15	Feb 19 1993		Brief of respondent Edge Broadcasting Company filed.
16	Feb 19 1993		Brief amici curiae of Association of National Advertisers, et al. filed.
17	Mar 4 1993		CIRCULATED.
19	Mar 23 1993	X	Reply brief of petitioners filed.
21	Apr 21 1993		ARGUED.

(1)

92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
T/A POWER 94

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT L. PETTIT
General Counsel
Federal Communications Commission
Washington, D.C. 20544

QUESTION PRESENTED

Whether 18 U.S.C. 1304 and 1307, which restrict the right of a radio or television licensee to broadcast lottery-related advertisements, violate the First Amendment Free Speech Clause when applied to a licensee operating in a State that prohibits lotteries, but whose broadcasts extend into a State that operates a state lottery.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
T/A POWER 94

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-9a, is unpublished, but the judgment is noted at 956 F.2d 263 (Table). The opinion of the district

court, App., *infra*, 10a-38a, is reported at 732 F. Supp. 633.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on May 20, 1992. App., *infra*, 40a-41a. On August 5, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and 18 U.S.C. 1304 and 1307 are reprinted in an appendix to this petition. App., *infra*, 42a-44a.

STATEMENT

This is a First Amendment challenge by a radio licensee to Congress's regulation of the use of the airwaves to promote state-run lotteries. See 18 U.S.C. 1304 and 1307. Together, Section 1304 and Section 1307 create a bright-line geographic rule, under which a station's right to broadcast lottery advertising hinges on the State to which it is licensed: A station broadcasting from a State with a state-run lottery can broadcast advertisements about that State's lottery, or about any other state-run lottery. By contrast, a station broadcasting from a State without a state-run lottery cannot broadcast advertisements about any state-run lottery. The validity of that bright-line rule is at issue in this case.

A. Historical And Statutory Background

Congressional restrictions on lotteries date from 1827.[1] In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars, or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress limited the prohibition to the mailing of letters or circulars concerning illegal lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. Four years later, however, Congress

[1] In pre-colonial England and during the early history of this nation, lotteries were a popular and respectable activity. See Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978); J. Ezell, *Fortune's Merry Wheel: The Lottery in America* 1-59 (1960); G. Sullivan, *By Chance a Winner: The History of Lotteries* (1972). Beginning in the Jacksonian period, lotteries fell into disfavor for various reasons, such as "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall." Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927. A major obstacle to reform efforts by the States was their inability to regulate lotteries that operated across state lines. States lacked authority to prosecute lotteries conducted in another jurisdiction or to regulate use of the mails to distribute lottery tickets and advertisements. Because States had to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task," Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931—they turned to Congress for help.

again extended the prohibition to all lotteries, including ones chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)).

The 1876 Act was challenged on the ground that it violated the First Amendment, but this Court rejected that argument in *Ex parte Jackson*, 96 U.S. 727 (1878). Nevertheless, that law was widely viewed as an ineffective weapon against lotteries, particularly the then-infamous and powerful Louisiana Lottery, the only one still operating legally in 1890.[2] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers,[3] that law did not stop the Louisiana Lottery from soliciting customers through newspaper advertisements.

After several years of debate,[4] Congress closed that loophole by passing the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)). The constitutionality of that law was challenged in *In re Rapier*, 143 U.S. 110 (1892), and, relying on *Ex parte Jackson*, *supra*, the Court upheld the Act over a First Amendment objection. In response, the Louisiana Lottery moved its operations to Honduras and used a Florida express

---

[2] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries); 21 Cong. Rec. 8714 (1890) (Rep. Evans).

[3] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885).

[4] There was considerable debate on whether applying the 1876 Act to newspapers would violate the First Amendment. See J. Ezell, *supra*, at 251-263; Blakey & Kurland, *supra*, 62 Cornell L. Rev. at 937-940.

company for its domestic business.[5] When Congress realized that the Louisiana Lottery still had not been shut down, Congress passed the Act of March 2, 1895, ch. 191, 28 Stat. 963 (codified at 18 U.S.C. 1301), which outlawed transportation of lottery tickets in interstate or foreign commerce. The constitutionality of that Act was also challenged, and this Court, for the third time, upheld Congress's anti-gambling efforts in *Champion* v. *Ames (No. 2) (Lottery Case)*, 188 U.S. 321 (1903), this time over a claim that the statute exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

2. The 19th century federal anti-lottery legislation is still in effect today with respect to privately-run lotteries. The basic prohibition on the mailing or carrying in interstate commerce of lottery tickets or lottery advertisements survives as 18 U.S.C. 1301 and 1302. After the birth of radio and television, Congress enacted Section 316 of the Communications Act of 1934, ch. 652, 48 Stat. 1088, which bars radio and television stations from broadcasting "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. 1304. The Federal Communications Commission can revoke a broadcaster's license for violating Section 1304. 47 U.S.C. 312(a)(6). These sections in the Postal and Communications Codes generally outlaw use of the mails and the airwaves to promote privately-run lotteries.[6]

---

[5] J. Ezell, *supra*, at 263-264, 267-268; G. Sullivan, *supra*, at 58; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 940; see *Report of the Postmaster-General*, H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. Pt. 4, at 17 (1891).

[6] Related provisions of Title 18 include: Section 1303, which prohibits any Postal Service officer or employee from

On the other hand, Congress has modified this regulatory scheme to reflect the renaissance of state-operated lotteries. In 1975, after the rebirth of state-run lotteries in New Hampshire, New Jersey, and New York, Congress allowed newspapers and broadcasters to advertise such lotteries if the newspaper or broadcast licensee is located in a State with a state-run lottery. See 18 U.S.C. 1307. Section 1307, as amended, permits advertising about state-sponsored lotteries "by a radio or television station licensed to a location in that State or in a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress adopted that exemption "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974). Congress sought to "mak[e] a reasonable balance between Federal and State interests in this area," including "the consideration and protection of the policies and interests of the States which do not provide for such lotteries." H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974).

3. This controversy over the constitutionality of 18 U.S.C. 1304 and 1307 arises from the opposing lottery policies of Virginia and North Carolina. North Carolina does not operate a state-run lottery and prohibits lotteries and lottery advertising. N.C. Gen. Stat. §§ 14-289, 14-290 (1991). By contrast, Virginia has had a state-conducted lottery since 1987, when

---

acting as a lottery agent; Section 1305, which creates a special exemption for fishing contests; Section 1306, which bars financial institutions from selling lottery tickets for state-operated lotteries. Provisions in the Postal Code establish a procedure by which the Postal Service can refuse to deliver lottery-related materials. 39 U.S.C. 3001-3007.

Virginia voters approved a lottery referendum. Va. Code Ann. § 58.1-4001 (1992). The Virginia State Lottery Board spends millions of dollars each year on broadcast and print media lottery advertising, and private Virginia businesses purchase radio advertising identifying their status as lottery ticket outlets. App., *infra*, 2a-3a, 12a-13a; C.A. App. 185-187, 196. Under 18 U.S.C. 1304 and 1307, a broadcasting station licensed to Virginia locations may carry Virginia lottery advertisements, but a station licensed to North Carolina locations may not, even if its service area extends into Virginia.

B. The Proceedings In This Case.

1. Respondent is a broadcasting corporation with studio and corporate offices in Virginia Beach, Virginia. Respondent is licensed by the FCC to operate an FM radio station in Elizabeth City, North Carolina. The station, whose call sign is WMYK (Power 94), broadcasts from Moyock, North Carolina, approximately three miles from the North Carolina-Virgina border. Due to its location, WYMK broadcasts to residents of both States. Roughly 127,000 North Carolina residents live in WMYK's service area. Approximately 8% of its listeners reside in North Carolina, with the remainder in Virginia. WYMK's listeners comprise a small percentage of North Carolina's total population, and most of them receive information about the Virginia lottery from Virginia broadcast media and other sources. App., *infra*, 2a, 6a, 10a-11a; C.A. App. 151, 167-168, 180, 188-189, 195-197, 226-230.

2. Respondent filed this action against the United States and the FCC in October 1988, five months after

acquiring WMYK. Respondent asserted that 18 U.S.C. 1304 and 1307 violate its free speech rights under the First Amendment by preventing it from broadcasting Virginia lottery advertisements. Petitioners defended the statutes on the ground, inter alia, that they are a permissible regulation of commercial speech under the test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). The first inquiry under *Central Hudson* is whether the speech concerns a lawful activity and is not misleading. The second prong asks whether the government's interests in regulating the speech are "substantial." The third inquiry is whether the regulation "directly advances" the government's interests, and the fourth prong asks whether the government's regulation is "no more extensive than is necessary to serve" its interests. 447 U.S. at 566; see *Board of Trustees* v. *Fox*, 492 U.S. 469, 477-481 (1989). The last two steps "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341 (1986); *Fox*, 492 U.S. at 480.

Acting on a stipulated record, the district court held that Section 1304 and Section 1307 are unconstitutional as applied to respondent. App., *infra*, 10a-38a. After noting that the first step of the *Central Hudson* test was not at issue, *id.* at 20a-21a, the court concluded that the government had a substantial interest in protecting the ability of "non-lottery states to discourage gambling," *id.* at 21a-22a, and that the regulatory scheme was a reasonable means of accommodating the interests of lottery and non-lottery States, *id.* at 27a-28a. Nevertheless, the court ruled

that the broadcast restrictions in Sections 1304 and 1307 did not directly advance the government's interests, because "North Carolinians in Power 94's service area experience pervasive exposure to Virginia lottery advertising through telecast, broadcast and print media" in Virginia. App., *infra*, 26a; see *id.* at 22a-27a. Since application of those statutes to WMYK does not "substantially reduce the volume of advertising about the Virginia lottery" that reaches North Carolina residents, the court ruled, they "fail materially to protect North Carolina residents from the harms which may result from lottery advertising," and therefore fail the third prong of the *Central Hudson* test. *Id.* at 27a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-9a. The majority concluded that Sections 1304 and 1307 satisfied the second and fourth steps of the *Central Hudson* test, App., *infra*, 5a-6a, 7a, but ruled that the laws do not "directly advance" the government's interests as applied to WMYK, *id.* at 7a. Because "[t]he North Carolina residents who might listen to Power 94 are inundated with Virginia's lottery advertisements," the majority reasoned, "[p]rohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina's residents from lottery information." *Id.* at 6a-7a.

Judge Widener dissented. App., *infra*, 8a-9a. He reasoned that while WMYK's North Carolina audience might be exposed to lottery information from Virginia, "[t]he fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional." *Id.* at 9a. He also expressed doubt that the majority's ruling could be confined to what

the majority called "the unique circumstances of this case." *Id.* at 6a, 9a. He pointed out that since "the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, * * * if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved." *Id.* at 9a.

4. The court of appeals denied the government's suggestion of rehearing en banc over the dissent of five judges. App., *infra*, 40a-41a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision invalidates as applied to respondent two Acts of Congress governing broadcast lottery advertising. In so doing, the court repudiated the bright-line geographic rule that Congress selected in order to balance the interests of lottery and non-lottery States under Sections 1304 and 1307. This repudiation of the line purposefully drawn by Congress rests on several basic errors of First Amendment commercial speech analysis, ignores (literally) this Court's most recent directly analogous commercial speech precedent, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, *supra*, and compromises the integrity and workability of a statutory scheme that Congress revisited and decided to maintain only four years ago. Before Congress's judgment about the proper balance of lottery and non-lottery interests is discarded as unconstitutional, review by this Court is warranted.[7]

[7] The panel chose not to publish its divided decision holding an Act of Congress unconstitutional. Whatever may be true in other cases, a decision by a court of appeals invalidating an Act of Congress under the Constitution is no less significant and no less deserving of review by this Court just because that decision is not formally published. This Court has granted review of an unpublished court of appeals' decision in other cases that raised a question warranting review by this Court. See, *e.g.*, *Spectrum Sports* v. *McQuillan*, cert. granted, No. 91-10 (to be argued Nov. 10, 1992); *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The court of appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."); *Rose* v. *Clark*, 478 U.S. 570 (1986). The same course is appropriate here.

1. The court of appeals and the district court were correct that the question presented in this case involves the application of Sections 1304 and 1307 only to non-misleading commercial speech about a lawful activity, the Virginia state lottery. App., *infra*, 5a, 16a-21a, 33a. Those courts also correctly held that Sections 1304 and 1307 satisfy the second and fourth parts of the *Central Hudson* test. App., *infra*, 5a-6a, 7a, 21a-22a, 27a-28a. As shown below, the federal government has a substantial interest in accommodating the lottery policies of the various States, and the broadcast regulatory scheme is narrowly tailored to achieve that end.

a. Sections 1304 and 1307 advance several substantial governmental interests. First, by prohibiting the commercial promotion of private lotteries, they further the policies of States that have forbidden gambling within their borders. Second, by restricting the interstate growth of private lotteries, Section 1304 helps to reduce the threat of organized criminal infiltration of gambling enterprises and makes it easier for the States that allow private lotteries to police

that activity. Third, by allowing state-run lotteries to be advertised, Congress has also allowed the States to maintain what is in effect a local monopoly over lottery activity as a means of raising state revenues.

Those interests are "substantial" under *Central Hudson*. The States historically have had the authority under their police power to prohibit gambling in order to protect their citizens against the harms traditionally associated with that activity. *Posadas*, 478 U.S. at 345; *Champion* v. *Ames (No. 2) (Lottery Case)*, 188 U.S. at 356-356; *Otis* v. *Parker*, 187 U.S. 606, 609 (1903). The States' judgment that gambling can be harmful is not irrational; in fact, this Court expressly so held in *Posadas*. 478 U.S. at 341. Finally, States may treat lotteries in the same manner as they treat any other form of gambling, see *Champion*, 188 U.S. at 355; *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880); *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 167-168 (1850), and Congress can regulate the use of federal communications instrumentalities, such as the mail, to aid the States' efforts to regulate gaming, see *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507 (1904); *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737. In sum, the regulatory scheme created by Sections 1304 and 1307 advances principles of federalism by helping States implement their policy judgments regarding privately-run and state-conducted gambling.

b. Sections 1304 and 1307 are narrowly tailored to achieve the federal government's and States' desired interests. *Fox*, 492 U.S. at 477-481; *Central Hudson*, 477 U.S. at 566. Congress freed broadcasters to promote lotteries if the station transmits from a State that operates a lottery, while restricting the commercial promotion of lotteries by licensees that

transmit from States prohibiting such activity. This bright-line geographic rule that Congress adopted is certainly a "reasonable" even if "imperfect" fit "whose scope is 'in proportion to the interest[s] served.'" *Fox*, 492 U.S. at 480. As the district court noted, "[s]hort of leaving regulation to the states, it is difficult to envision a more narrowly-tailored set of provisions than those set forth in sections 1304 and 1307." App., *infra*, 28a. Indeed, respondent did not challenge the district court's ruling in this respect in the court of appeals. *Id.* at 7a.

2. The majority nonetheless concluded that Sections 1304 and 1307 could not constitutionally be applied to respondent since they do not "directly advance" the government's interests and therefore do not pass the third part of the *Central Hudson* test for the regulation of commercial speech. The majority's reasoning, however, is flawed in three basic respects, each of which is fatal to the majority's conclusion.

a. The majority's first error was its failure to recognize that Sections 1304 and 1307 are designed to serve not one interest, but two: discouraging lottery participation in the States that do not sponsor lotteries *and* accommodating lottery participation and promotion in the States that do. H.R. Rep. No. 1517, *supra*, at 5; S. Rep. No. 1404, *supra*, at 2. The simultaneous pursuit of these two interests reflects a single unifying purpose with deep roots in federalism: namely, assisting the States in their pursuit of independent social and economic policies.

Under *Central Hudson*, the question is whether Sections 1304 and 1307 "directly advance" the two interests being simultaneously pursued by Congress. The answer to that question is clearly yes. On their

face, Sections 1304 and 1307 directly advance both interests by allowing broadcast lottery advertising in lottery States while prohibiting it in non-lottery States. See S. Rep. No. 1404, *supra*, at 3 ("the accommodation afforded by [Section 1307] meets the essential needs of lottery States without unnecessarily encroaching on non-lottery States"). And even as applied in this case Sections 1304 and 1307 satisfy the direct advancement test, since they allow lottery advertising by Virginia's stations while preventing lottery advertising by a North Carolina station that reaches more than 100,000 North Carolina residents.

The Court has made clear that a legislature is free to restrict one source of commercial speech while allowing another, as Congress has done here, as long as it is reasonably attempting to reconcile competing interests. In *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), the Court rejected a First Amendment challenge to a San Diego ordinance that, for safety and aesthetic reasons, banned *offsite* billboard advertising but permitted *onsite* billboard advertising and other specified commercial signs. In upholding the ordinance, the Court deferred to San Diego's policy judgment about the balance to be struck "between the city's land-use interests and the commercial interests of those seeking to purvey goods and services," 453 U.S. at 512 (plurality opinion); *id.* at 541 (Stevens, J., concurring in part and dissenting in part). The Court held that San Diego could resolve this balance in favor of restricting one source of advertising (offsite billboards) but against restricting another source (onsite billboards) without running afoul of *Central Hudson*'s direct advancement test. By the same token, Congress should be free to balance the competing interests of non-lottery and lottery States by restricting

advertising from one source (stations in non-lottery States) while allowing lottery advertising from another source (stations in lottery States). The fact that the results are imperfect does not mean that Sections 1304 and 1307 fail to "directly advance" the balance sought by Congress.

b. The majority limited its attention to only one of the interests served by Sections 1304 and 1307, that of protecting non-lottery States. As just shown, the failure to take account of *both* interests underlying those statutes was error. But even if it were proper to look only to Congress's interest in supporting the policies of non-lottery States, Sections 1304 and 1307 would still pass muster under *Central Hudson* in this case.

In reaching a contrary conclusion, the majority relied on the fact that WMYK's North Carolina audience already receives a substantial volume of Virginia lottery advertising from Virginia media. App., *infra*, 6a-7a. In essence, the majority held that, as applied in this case, Sections 1304 and 1307 are fatally underinclusive: that is, too much commercial speech about the Virginia lottery has been left unrestrained for Sections 1304 and 1307 to "directly advance" Congress's goal in this case. Yet, this Court rejected a similar argument in *Metromedia*, ruling that the San Diego billboard ordinance was not impermissibly underinclusive because of its failure to ban onsite and offsite advertising. 453 U.S. at 511 (plurality opinion); *id.* at 541 (Stevens, J., concurring in part and dissenting in part); accord *Posadas*, 478 U.S. at 342-343.

The majority's underinclusiveness reasoning is misguided since *Central Hudson*'s direct advancement standard is not primarily an empirical test, with

courts gauging the efficacy of a statutory restraint and invalidating it whenever they deem it to be ineffective.[8] Such an approach would involve the judiciary in a quintessentially legislative task. The direct advancement standard asks a different, more qualitative question: whether there is a logical or common sense link, not an indirect or speculative one, between the restraint imposed by Congress and the policies sought to be advanced. See *Posadas*, 478 U.S. at 342 (the direct advancement step is met when the legislative judgment is "a reasonable one"); *Metromedia*, 453 U.S. at 508-509 (plurality opinion) (the direct advancement step is met when the legislative judgment "is not manifestly unreasonable"; accepting "the accumulated, common sense judgments of local lawmakers and of many reviewing courts that billboards are real and substantial hazards to traffic safety"). As long as such a link exists between the restraint imposed and the interests pursued, underinclusiveness does not disable a statute and prevent it from "directly advancing" those interests. Whether the restriction is "worth it" is a judgment for the legislature.

It can hardly be gainsaid that there is a direct connection between restrictions on lottery advertising

[8] This Court arguably undertook such an inquiry in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), in which the Court struck down a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. Such heightened scrutiny was warranted in *Youngs Drug Products*, however, only because "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected." *Posadas*, 478 U.S. at 345. Here, by contrast, the underlying conduct (gambling) not only is not constitutionally protected, but could be prohibited altogether. *Ibid.*

and lottery participation. This Court held in *Posadas* that a legislature may reasonably conclude that restricting the advertising of gambling will reduce the consumer demand for that activity, and will thereby further the government's interest in protecting the public from the harms associated with gambling. 478 U.S. at 341-342. That ruling is consistent with other decisions by this Court and the lower federal and state courts holding that a legislature reasonably may believe that a restriction on the advertising of alcoholic beverages will reduce alcohol consumption and the injuries drinking can cause.[9] That conclusion also makes economic sense. Banning advertising of a product makes it costly for consumers to learn about and purchase that good, see *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-765 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 26-28 (1979), and complements a ban on the distribution of that good. In fact, society has historically imposed advertising restrictions to limit the growth of activi-

[9] See *Queensgate Inv. Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138, 142, appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 749-750 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 501 (10th Cir. 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729, 734-735 (R.I. 1985); *R.I. Liquor Stores, Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331, 335-337 (R.I. 1985); cf. *Republic Entertainment, Inc.* v. *Clark County Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 672 P.2d 634 (1983); *Princess Sea Indus., Inc.* v. *State*, 97 Nev. 534, 635 P.2d 281 (1981), cert. denied, 456 U.S. 926 (1982).

ties deemed harmful, such as alcohol consumption or gambling, and such restrictions have long been considered reasonable.

c. The third shortcoming of the majority's reasoning is its failure to come to grips with this Court's decision in *Posadas*.[10] In that case, this Court upheld a Puerto Rico statute that prohibited advertisements of casino gambling aimed at Puerto Rico residents, but allowed casino advertising aimed at non-residents and allowed other forms of gambling advertising without regard to the target audience. This Court held that the statute "clearly" satisfied the third prong of the *Central Hudson* test because the legislature "reasonabl[y]" believed that advertising of casino gambling aimed at Puerto Rico residents "would serve to increase the demand for the product advertised." 478 U.S. at 342. Relying on *Metromedia*, the Court rejected an argument that the statute was fatally underinclusive because it allowed a variety of other forms of gambling to be advertised to local residents. *Ibid.* Moreover, the Court stated that since the legislature "could have prohibited casino gambling by the residents of Puerto Rico altogether[,] * * * the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345-346.

The majority decision makes no reference to *Posadas*, yet *Posadas* strikes at the heart of the majority opinion. If the "greater power" to ban gambling "necessarily includes the lesser power" to ban

[10] Though discussed extensively by the district court and the parties on appeal, *Posadas* is not even cited by the court of appeals, much less distinguished.

gambling advertising, respondent's claimed First Amendment right to broadcast lottery advertising is wholly without merit. And even if *Posadas* does not make restraints on gambling per se constitutional, it certainly offers strong support for the constitutionality of Sections 1304 and 1307 under *Central Hudson*, both facially and as applied in this case. There is no reason to believe that the target-based restriction on casino gambling advertising in *Posadas*, which exposed the local residents to gambling advertising as long as it was not "aimed" at them, was any more effective, to paraphrase the majority below, at "shielding [Puerto Rico's] residents from [gambling] information," App., *infra*, 7a, than Congress's geographic restriction on lottery advertising here. *Posadas* shows that an added measure of judicial deference is due when a legislature makes a judgment about the effect of advertising restrictions on gambling and similar activities. No such deference can be found in the majority's opinion in this case.

3. The court of appeals' decision in this case is clearly out of step with decisions by this Court and lower federal courts that have addressed the constitutionality of Congress's lottery advertising scheme. This Court has three times previously upheld the constitutionality of that regulatory scheme: The Court twice rejected First Amendment challenges to the predecessor versions of 18 U.S.C. 1302 in *Ex parte Jackson* and *In re Rapier*, and rejected a Commerce Clause challenge to the predecessor to 18 U.S.C. 1301 in *Champion* v. *Ames (No. 2) (Lottery Case)*. In addition, before Congress modified the scheme in 1975 in order to allow advertising of state-run lotteries by certain licensees, the Second and Third Circuits concluded that Congress could alto-

gether prohibit commercial promotion of state-run lotteries. See *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969); *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), vacated and remanded on other grounds for consideration of mootness, 420 U.S. 371 (1975).[11]

Under the decisions by this Court and by the Second and Third Circuits, if Congress had never enacted Section 1307, leaving the unqualified ban on lottery advertising in Section 1304 undisturbed, it could not seriously be maintained that Section 1304 failed to

[11] The Second Circuit upheld the constitutionality of Section 1304 as applied to advertisements or information directly promoting a state-conducted lottery. 414 F.2d at 997, 998. The Third Circuit concluded that Section 1304 would be unconstitutional if it were applied to ban broadcasting of the winning number in a lawful state-run lottery, but also determined that it constitutionally could be applied to compensated broadcasts. 491 F.2d at 224. The Court granted certiorari to review the Third Circuit's ruling, but later ordered the case dismissed as moot after Congress adopted Section 1307. 420 U.S. 371 (1975).

More than a decade later, this Court noted probable jurisdiction over an appeal and a cross-appeal from the district court's decision in *Minnesota Newspaper Ass'n* v. *Frank*, 677 F. Supp. 1400 (D. Minn. 1987), which held that Section 1302 was constitutional as applied to advertisements, but was unconstitutional as applied to prize lists in news reports. After Congress passed legislation affecting the scope of Section 1302 and in light of the government's interpretation of the scope of Section 1302, the private-party plaintiffs dismissed their challenge to Section 1302. See *Minnesota Newspaper Ass'n* v. *Postmaster General*, 488 U.S. 998 (1989) (plaintiff's-cross appellant's voluntary dismissal under Sup. Ct. R. 53 of cross-appeal); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989) (dismissal of government's appeal as moot).

"directly advance" Congress's interest in protecting the policies of the non-lottery States. It is only because Congress *relaxed* the once-absolute prohibition on lottery advertising that the majority below could condemn under the *Central Hudson* direct advancement test the one remaining restriction in the broadcast regulatory scheme. The Fourth Circuit's decision in this case therefore has the perverse effect of condemning Section 1304 and 1307 precisely because those statutes permit *more* speech to be broadcast than would be the case if Section 1307 never had been enacted at all.[12] Nothing in *Central Hudson* or any other commercial speech precedent requires such a perverse result. The inconsistency between the decision below and the regulatory scheme that would be lawful under those precedents requires review by this Court.[13]

[12] Indeed, if WMYK's listeners are as "inundated with Virginia's lottery advertisements" as the court of appeals believed, App., *infra*, 6a-7a, the ruling below is doubly ironic. After all, the speech at issue here is not speech that expresses a political, scientific, or artistic opinion, but is merely speech that proposes a commercial transaction. See *Fox*, 492 U.S. at 473-474; *Posadas*, 478 U.S. at 340; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. Under the facts discussed by the courts below, there is little (if any) injury to the First Amendment interests of WMYK's audience, and no injury to respondent's ability to engage in discourse. The only injury is to respondent's ability to turn a profit by selling air time for lottery advertisements.

[13] Only four years ago, Congress revisited the question whether the lottery advertising restrictions in Title 18 should be repealed. Instead of repealing this regulatory scheme, Congress decided to add certain additional exemptions. Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, § 2(a), 102 Stat. 3205; Indian Gaming Regula-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys

ROBERT L. PETTIT
General Counsel
Federal Communications Commission

SEPTEMBER 1992

---

tory Act, Pub. L. No. 100-497, § 21, 102 Stat. 2486. Congress retained the bright-line geographic rule adopted in 1974 and rejected proposals to abandon that approach. App., *infra*, 36a-37a. Congress's judgment that the broadcast regulatory scheme as modified serves valuable federal and state interests is entitled to deference from the courts, see *Posadas*, 478 U.S. at 342, which is clearly absent from the decisions below.

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2668

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Frank A. Kaufman, Senior District Judge
(CA-88-693-N)

Argued: October 31, 1990

Decided: February 27, 1992

Before WIDENER, Circuit Judge, CHAPMAN, Senior Circuit Judge, and HADEN, Chief United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion. Judge Widener wrote a dissenting opinion.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The Federal Communications Commission appeals a judgment construing 18 U.S.C. §§ 1304 and 1307 as governing only commercial speech and holding the application of 18 U.S.C. §§ 1304 and 1307 limiting advertising by a radio station to be an unconstitutional restriction on commercial speech. We affirm.

I.

Edge Broadcasting Corporation (Edge) owns and operates the 100,000 watt radio station WMYK-FM known as "Power 94." Power 94 is licensed by the Federal Communications Commission to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina. Moyock is approximately three miles from the North Carolina and Virginia borderline. Corporate offices are located in Virginia Beach, Virginia, and Power 94 carries the dual identification of Elizabeth City, North Carolina, and Virginia Beach, Virginia.

Since Power 94 is located so close to the Virginia and North Carolina borderline, its signal is broadcast to residents of both states. It is estimated that 92.2% of Power 94's listening audience resides in Virginia and that 7.8% of the audience resides in North Carolina. Power 94's signal reaches nine counties in North Carolina. Less than 2% of all North Carolinians reside in those counties.

The State of North Carolina and the Commonwealth of Virginia have adopted opposite views regarding state-sponsored lotteries. A majority of Virginia voters approved a referendum on November 3, 1987, creating a state-run lottery to "produce revenue

consonant with the probity of the Commonwealth and the general welfare of the people." Virginia Code Ann. § 58.1-4001 (1987). In North Carolina, to the contrary, it is a criminal offense to operate a lottery and that state does not sponsor a lottery. N.C. Gen. Stat. §§ 14.289 and 14.291 (1983). Edge derives most of its advertising income from Virginia-based companies and seeks to participate in the very substantial expenditures Virginia makes in advertising its lottery. Edge has refrained from broadcasting information regarding the Virginia lottery for fear of violating federal law.

As part of a federal regulatory scheme of state lotteries, 18 U.S.C. §§ 1304 and 1307 provide in pertinent part as follows:

> 1304. Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or any information concerning any lottery, gift enterprise, or similar scheme . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> 1307. (a) [An exemption from criminal liability under § 1304 is granted for] . . . an advertisement, list of prizes, or information concerning a lottery conducted by a state acting under the authority of state law—
>
> • • • • •
>
> (2) broadcast by a radio or television station licensed to a location in that state or an adjacent state which conducts such a lottery.

Pursuant to its regulatory authority, the Federal Communications Commission "may revoke any station

license . . . (6) for violation of section 1304." 47 U.S.C. § 312(a). Since Power 94 is licensed to North Carolina, a non-lottery state, the station is prohibited from advertising Virginia's lottery and it may suffer possible revocation of its license if it refuses to comply with the regulations.

Edge brought an action challenging the constitutionality of 18 U.S.C. §§ 1304 and 1307 as applied to prohibit Power 94's broadcasting of Virginia lottery advertisements and information. The district court construed sections 1304 and 1307 as relating only to commercial speech and held that the application of these sections to Edge's operation of Power 94 is a constitutionally invalid restriction on commercial speech. From this order the Federal Communications Commission appeals.

II.

Under First Amendment analysis, a lesser degree of protection is accorded commercial speech than other constitutionally guaranteed expressions.* Commercial speech is accorded " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes or regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989) (*citing Ohrlik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978)). Al-

* The parties are in agreement that 18 U.S.C. §§ 1304 and 1307 cannot be applied to restrict noncommercial speech about the Virginia lottery. Consequently, listings of prizes and winners and more general news accounts of lottery activities are fully protected by the First Amendment. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

though commercial advertising is entitled to less protection under the First Amendment than noncommercial speech, "commercial speech that is not false or deceptive and does not concern unlawful activity . . . may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 638 (1985). In order to uphold the constitutionality of a regulation on commercial speech, the government must establish that the restriction "directly advances a substantial government interest." *Id.* at 641.

The test for determining the constitutionality of a restriction on commercial speech is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial free speech to come within that provision, [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [3] determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

Edge's desire to broadcast Virginia lottery information clearly meets the first prong of the *Central Hudson* test. Virginia's lottery is a lawful activity and previous advertisements were not misleading.

The governmental interest asserted in regulating lottery information is the furtherance of fundamental tenets of federalism which permit non-lottery states

to discourage gambling. Although Edge argues that discouraging gambling is not a substantial governmental interest under the second prong of the *Central Hudson* test, the governmental interest asserted is similar to other "substantial" interests recognized as meeting this prong. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 568-69 (a state law restriction on utility advertising designed to reduce energy consumption); *Oklahoma Broadcasters Association v. Crislip*, 636 F. Supp. 978 (W.D. Okla. 1985) (a state statutory prohibition upon liquor advertising intended to reduce consumption of alcohol). Edge argues that this interest is not sufficiently substantial because some thirty-three states now sponsor their own lotteries. Nevertheless, as the district court noted, the second prong of the *Central Hudson* test is not a strict one and the government has satisfied it in this case.

The third prong requires that a restriction on commercial speech directly advance the interest of the jurisdiction whose legislation is challenged. "Ineffective or remote support" fails to justify an infringement on First Amendment free speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564. Under the unique circumstances of this case, the government's goal to preserve state lottery policies is not advanced by precluding Power 94 from broadcasting Virginia lottery advertisements. Approximately 127,000 North Carolina residents are within Power 94's broadcast range. These listeners, who comprise less than 2% of North Carolina's total population, receive most of their radio, newspaper and television communications from Virginia-based media. The North Carolina residents who might listen to Power 94 are inundated

with Virginia's lottery advertisements. Simply put, the North Carolina residents which the statutes purport to protect already are exposed to numerous Virginia Lottery advertisements through telecast, broadcast and print media. Prohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina residents from lottery information. This ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech.

The fourth prong of the *Central Hudson* test provides that a restriction on commercial speech may be "no more extensive than necessary to further the state's interests . . . ." 447 U.S. at 569-70. Under this standard, the regulation must be one "that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The district court concluded that the lottery advertisement regulations met this standard. Neither party objects to this finding and we concur with the district court's reasoning.

Thus, in this case 18 U.S.C. §§ 1304 and 1307 fail the *Central Hudson* test since the regulations do not directly advance the governmental interest asserted. Since the regulations as applied to Edge Broadcasting fail to meet the third prong of the *Central Hudson* test, they work an unconstitutional restriction on commercial speech.

III.

The Federal Communications Commission additionally argues that the district court improperly used an "as applied" standard when evaluating Edge's

challenge to 18 U.S.C. §§ 1304 and 1307. We disagree.

An "as applied" challenge is proper when testing the validity of facially valid restrictions on political speech. *Hess v. Indiana*, 414 U.S. 105 (1973). The same is true under commercial free speech analysis. An "as applied" analysis should be performed to test the constitutionality of a particular application of a law prior to addressing any other constitutional challenges. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). If a regulation on commercial speech cannot pass constitutional muster "as applied," then the constitutional analysis is concluded. Accordingly, the district court properly used an "as applied" analysis when testing the constitutionality of the challenged provisions.

IV.

Based on the foregoing reasons, we conclude that the district court properly held that 18 U.S.C. §§ 1304 and 1307 are an unconstitutional restriction on commercial speech as applied to advertisements concerning Virginia's lottery by Power 94 and Edge Broadcasting. Accordingly, the decision below is hereby

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I disagree with the majority's analysis of the third prong of the *Central Hudson* requirement.

As the majority correctly recites, the interest of the United States is to preserve state lottery policies, and that is explicitly expressed in 18 U.S.C. §§ 1304 and 1307. I think it a mistake to hold, as we do,

that those statutes as applied are invalid because less than 2% of North Carolina's total population are exposed to the broadcast of WMYK-FM. And the fact that such 2% may be exposed to the broadcasts from Virginia does not alter the fact that Congress has the undoubted right to enact the legislation which it did. The fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional.

Another objection to this decision is that as a practical matter the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, so if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS

Filed: February 23, 1990

KAUFMAN, Senior District Judge.*

Edge Broadcasting Corporation (Edge), a corporation with its principal place of business in Virginia Beach, Virginia, has, since 1988, operated the 100,000 watt radio station WMYK-FM known as "Power 94." That station is licensed by the Federal Communications Commission (FCC) to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina, which is located approximately three miles

* Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

south of the border between Virginia and North Carolina. Power 94 is one of twenty-four commercial radio stations serving the Hampton Roads, Virginia metropolitan area. According to Arbitron survey estimates,[1] approximately 92.2% of the persons who comprise Power 94's listening audience reside in Virginia, and approximately 7.8% reside in North Carolina. Although the station's signal reaches nine counties in North Carolina, fewer than 2% of all North Carolinians reside in those counties.

Edge challenges the constitutionality of two provisions of the federal lottery statute, namely, 18 U.S.C. §§ 1304 and 1307, which provide in pertinent part as follows:

> § 1304. Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> § 1307. [An exemption from criminal liability under section 1304 is granted for] (a) . . . an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of state law—
>
> . . .
>
> (2) broadcast by a radio or television station licensed to a location in that state

[1] The parties seemingly have each treated as reliable those survey estimates by the Arbitron Ratings Company.

or an adjacent State which conducts such a lottery.

Corresponding regulations embodying the same substantive restrictions on lottery advertising as those statutory provisions are contained in 47 C.F.R. Part 73.1211. Those regulations also state that the FCC "may revoke any station license . . . (6) for violation of section 1304." An additional statute also provides for a civil forfeiture penalty not to exceed $1,000 in the event of a section 1304 violation. 47 U.S.C. § 503(b)(1)(E).

The State of North Carolina does not sponsor a lottery, and its statutes make participation in and advertising of nonexempt raffles and lotteries a misdemeanor. N.C. Gen. Stat. §§ 14.289 and 14.291 (1983). On the other hand, the Commonwealth of Virginia is authorized by Virginia statute to sponsor a lottery, Va. Code Ann. § 58.1-4001 (1987), and since 1988, has conducted a series of lottery games.

In 1988, the Commonwealth paid $1,285,141 in advertising costs to the media. In 1989, the Virginia Lottery Board estimated that those expenditures would reach in that year $2.3 million, including advertising over seven Hampton Roads radio stations. In addition, certain private businesses, located in the Hampton Roads area, include references in their own radio advertising to their status as lottery ticket outlets. According to Arbitron estimates, 38% of all radio listening in the area reached by Power 94 is directed to Virginia stations which include in their programs broadcasts of lottery advertising.

In addition to radio advertising, the Lottery Board purchases advertising space in the Hampton Roads area's two large newspapers, both of which also circulate in the North Carolina counties reached by

Power 94's signal. Further, the Board presently spends nearly half of its advertising budget on television time, including purchases of time on four Hampton Roads television stations which reach the nine North Carolina counties served by Power 94 as well as additional areas of that state. Arbitron surveys estimate that 64% of all television viewing in those nine North Carolina counties is directed to Virginia television stations which carry such lottery advertising.

Edge estimates that it derives more than 95% of its local advertising revenues from sources in the State of Virginia, and alleges that its fear of being subjected to section 1304's criminal penalties has caused it to refrain from broadcasting any advertisements promoting the Virginia lottery. Power 94 has not sold advertising time to the State of Virginia for the broadcast of lottery promotions or to private businesses for advertising of their status as lottery outlets. As a result, Edge estimates that it has lost, and will continue to lose, advertising revenues totalling in the millions of dollars. To date, Edge has not been threatened with prosecution under section 1304. Specifically, in this case, plaintiff seeks a declaratory decree that sections 1304 and 1307 together with the corresponding FCC regulations, as applied to Edge, violate the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment, of the Constitution of the United States, and further seeks injunctive protection against enforcement of those statutes and regulations.

After alternate motions to dismiss and for summary judgment filed by the United States pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure were denied by this Court, counsel for

both sides submitted this case for a decision by this Court on agreed facts, and presented written and oral legal arguments. For the reasons stated *infra*, this Court concludes that plaintiff is entitled to the relief it seeks in this case.

I.

The prohibition in sections 1304 and 1307 against the radio broadcast of lottery advertising and information by licensees located in non-lottery states is part of a comprehensive scheme of federal legislation regulating interstate transportation and mailing of lottery information. More than 100 years ago, Congress enacted a complete ban on the importation, mailing and advertisement of lotteries, *Ex parte Rapier*, 143 U.S. 130, 133 (1892), and extended that prohibition to radio broadcasting by the Communications Act of 1934,[2] *National Broadcasting Co. v. United States*, 347 U.S. 284, 289 (1954).

"The right of free speech does not include . . . the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943). Although, as Justice White has written, "broadcasting is clearly a medium affected by a First Amendment interest," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1968), the Supreme Court has indicated that Congress possesses greater latitude to regulate broadcasting than other forms of communication. For example, in *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 74 (1983), Justice Marshall observed: "Our decisions have recognized that the special interest of the federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." (Footnote and citations omitted). And in *National Broadcasting Co. v. United States*, 347 U.S. at 289, the Supreme Court specifically extended to radio coverage the power of Congress constitutionally to restrict the interstate dissemination of lottery materials recognized in *Ex parte Rapier*, 143 U.S. at 133. *See also New York State Broadcasters Ass'n, Inc. v. United States*, 414 F.2d 990, 996 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

[2] The predecessor of 18 U.S.C. § 1304 is the former section 316 of the Communications Act of 1934, which, at the time of its passage in 1934, imposed criminal penalties upon any licensed radio broadcaster who "knowingly permits the broadcasting of, any advertisement of or information concerning any lottery . . . ."

II.

Section 1304's language prohibiting the broadcast of "any advertisement . . . or information" concerning lotteries by stations licensed to locations in non-lottery states is so broad that it seemingly reaches noncommercial as well as commercial speech. "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-63 (1980).

As Justice Scalia has recently written, commercial speech only enjoys " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' *Ohralik v.*

Ohio State Bar Assn, 436 U.S. 447, 456 (1978)." *Board of Trustees of the State Univ. of New York v. Fox*, —— U.S. ——, 106 L.Ed.2d 388, 402 (1989). In contrast, content-based restrictions on noncommercial speech meet First Amendment standards "only in the most extraordinary circumstances." *Bolger*, 463 U.S. at 65. In *Bolger*, Justice Marshall noted that when such restrictions have been upheld, they have fallen into a few "specialized and limited categories" such as "libel," "obscenity," or "fighting words." *Id.* at 65, n.7.[3] Thus, at the outset, the question arises as to whether section 1304 bars only communication which does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973), or whether it also reaches noncommercial information. In this case, this Court's task with respect to section 1304's application to noncommercial speech is rendered considerably easier by the government's statement in oral argument that the government would not oppose a decree limiting the application of section 1304 to Power 94's operations to the realm of commercial speech. That position accords with decided case law. For example, Judge Feinberg avoided invalidating section 1304 on First Amendment grounds by concluding that "the phrase 'information concerning any lottery' refers only to information that directly promotes a particular existing lottery" and does not prohibit the broadcasting of, for example, "an editorial for or against continuing the lottery experiment started by New York State in 1967." *New York Broadcasters Ass'n*, 414 F.2d at 997. *See*, to the same effect, *New Jersey State Lottery Comm'n*

[3] Seemingly, one should add to this list speech intended and likely to incite imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

v. United States, 491 F.2d 219, 224 (3d Cir. 1974) (Gibbons, J.) (en banc), *vacated as moot and remanded*, 420 U.S. 371 (1975); *Minnesota Newspapers Ass'n v. Postmaster General*, 677 F. Supp. 1400 (D. Minn. 1987), *vacated as moot and remanded*, 109 S.Ct. 1734 (1989).[4]

[4] In *New Jersey State Lottery*, a radio station licensed to the state sought a declaratory decree that section 1304 did not apply to the broadcast of a winning number in the New Jersey state-operated lottery. After the Third Circuit granted the petitions of the states of New Hampshire and Pennsylvania to intervene and after the Circuit, sitting en banc, reversed the ruling of the FCC adverse to that contention, the Supreme Court granted certiorari. However, thereafter, as it later did in *Minnesota Newspapers*, the Supreme Court vacated as moot the judgment below, in the light of the 1974 amendments to section 1307 which replaced what was in essence a blanket ban on lottery information broadcasts with the current statutory scheme. Dissenting, Justice Douglas wrote, *inter alia*, in a starred unnumbered footnote:

> As the State of New Hampshire points out, the new § 1307 even on its face does not resolve the claims of all parties to this action. New Hampshire, which was granted leave to intervene in the Court of Appeals, conducts a lottery; neighboring Vermont does not. Title 18 U.S.C.A. § 1307(a)(2) (Supp. Feb. 1975), upon which the court relies, applies only to broadcasts by a station in the State which conducts the lottery, or in an adjacent State which also conducts a lottery; presumably, then, § 1304 remains applicable to a Vermont radio station which desires to broadcast information concerning the New Hampshire lottery. The restraint imposed by § 1304 will thus continue to inhibit the New Hampshire lottery with respect to certain groups of prospective participants, including New Hampshire residents who listen to Vermont radio stations and Vermont residents who might wish to cross the state line and participate.

United States v. New Jersey State Lottery Comm'n, 420 U.S. 371, 375 (1975). In this case, the questions which arise

Power 94 alleges that it has not broadcast any information about the Virginia lottery, including news accounts of winning numbers and other announcements about the Virginia lottery, out of fear of prosecution under section 1304. To the extent that it may constitutionally restrict noncommercial speech, section 1304 must then either serve a compelling state interest or fall within one of the exceptions developed by the Supreme Court in *Bolger*. It does neither. No party has suggested that lottery information is either libelous or obscene, incites lawless action or constitutes "fighting words." As such, the broadcast of noncommercial lottery information falls into none of the exceptions from strict scrutiny.

In fact, the very reasons advanced herein by the government in support of its position with relationship to commercial speech indicate that as to noncommercial speech there are lacking compelling state interests. The purpose articulated by Congress for prohibiting non-lottery state broadcasts was to "free[] the means of communication to State-run lotteries to the maximum extent possible consistent with adequate Federal recognition of and protection for the policy of non-lottery States." S. Rep. 93-1404, 93rd Cong., 2d Sess. 3 (1974). A state's desire to limit the participation of its residents in lotteries sponsored by one or more other states, and the federal government's policy of honoring that preference, simply do not rise to the level of the type of compelling state interests articulated in *Bolger* and, thus, do not justify reading section 1304's restrictions so as to cover noncommercial lottery information. In follows, as the government does not oppose in this

---

are, of course, similar to those to which Justice Douglas so referred.

case, that sections 1304 and 1307 should not be read to prohibit Power 94 to broadcast noncommercial information about lotteries.

III.

While commercial advertising is entitled to less protection under the First Amendment than noncommercial speech, it nonetheless has been afforded significant First Amendment safeguards since it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-62 (1980). "Commercial speech that is not false or deceptive and does not concern unlawful activity . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985), citing *Central Hudson Gas*, 447 U.S. at 566. The proponent of any such restriction has the burden of establishing that such restriction "directly advances a substantial government interest." *Id.* at 641.

In *Central Hudson Gas & Electric Corp.*, Justice Powell enunciated a four-part analysis for determining the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial free speech to come within that provision, it must at least concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must

> determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. That four-part test has been uniformly accepted as the analytical framework for determining the constitutionality of restrictions upon commercial speech. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981); *Oklahoma Broadcasters Ass'n v. Crisp*, 636 F. Supp. 978, 980-81 (W.D. Okla. 1985).

IV.

In *Central Hudson*, Justice Powell reiterated the principle that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." *Id.* at 563. Thus, the first prong of the *Central Hudson* test examines whether the activity spoken of is lawful and whether the information imparted is truthful. "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.*

Power 94 wishes to broadcast advertising about the Virginia lottery sponsored by both the state itself and private sales outlets located in the Hampton Roads areas. The Virginia lottery was lawfully created by the state's voters in a November 3, 1987 referendum and established by Virginia statute. Va. Code Ann. § 58.1-4001 (1987). The legality of advertising about the Virginia lottery is thus undisputed.

Similarly, defendants do not suggest that the advertising at issue in this case would be misleading

or deceptive. Indeed, the government has acknowledged that the content Edge wishes to broadcast is truthful. Thus, Edge has no difficulty meeting in this case the first prong of the *Central Hudson* test.

The second prong of that test concerns the substantiality of the government interest. In this litigation, the government characterizes the interests served by sections 1304 and 1307 as the furtherance of fundamental interests of federalism enabling non-lottery states to discourage gambling. Those interests are similar to other "substantial" interests which have been accepted as complying with *Central Hudson*'s second standard. For example, a state statutory prohibition upon liquor advertising—a restriction designed to reduce consumption of alcohol—has been upheld, *Oklahoma Broadcasters Ass'n v. Crisp*, 636 F. Supp. at 982; and a state law restriction on utility advertising designed to reduce energy consumption has been recognized as valid, *Central Hudson*, 447 U.S. at 568-69. In those cases, state laws have been involved. Herein, it is federal legislation whose validity is at issue. But Congress may assist states in inhibiting activity considered by a state to be contrary to public policy by regulating the promotion by radio broadcasting. *See New York State Broadcasters*, 414 F.2d at 996-97 (substantial government interest served in federal ban on lottery advertising); *Banzhaf v. FCC*, 405 F.2d 1082, 1101 (D.C. Cir. 1968) (FCC regulation of cigarette advertising intended to reduce cigarette consumption implied).

More than a century ago, in *Ex parte Rapier*, 143 U.S. at 133, the Supreme Court sustained the constitutionality of precursor provisions to 18 U.S.C. § 1302, a statute barring use of the mails for lottery promotion and the basis for the predecessor provision

to section 1304. Although both social attitudes and legal proscriptions regarding gambling have seemingly eased in the intervening century, the desire of a state to regulate gambling is still respected by the courts. Thus, in 1986, in *Posadas*, the Supreme Court upheld Puerto Rican legislation restricting the advertising of casino gambling. *Posadas*, 478 U.S. at 341. Edge, in support of its contention that the interest of the State of North Carolina is not sufficiently substantial, emphasizes the fact that attitudes with respect to lotteries have changed dramatically in past decades, to the point where at least 33 states now sponsor their own lotteries. Further, Edge asserts that section 1307's exemption for broadcasters located in states where lotteries are legal acknowledges that the interest in reducing consumption is insubstantial and, morever, that interests of federalism are in this day and age best served by leaving decisions concerning lottery advertising to the states.

The "substantial interest" standard, *i.e.*, the second prong of the *Central Hudson* test, is not a strict one. Thus, in *Posadas*, the Supreme Court recognized Puerto Rico's substantial interest in the reduction of gambling, even though the regulation at issue in that case only restricted selected forms of advertising of casino gambling while permitting advertising of other forms of gambling. *Posadas*, 478 U.S. at 344. In that context, the federal government's interest in protecting the desires of a non-lottery state, *i.e.*, North Carolina, to limit lottery participation must still be termed "substantial."

The third prong of the *Central Hudson* test requires that a restriction on protected commercial speech directly advance the interest of the jurisdiction whose legislation is challenged. If a prohibition

provides only "ineffective or remote support" for such objective, it fails under the First Amendment. *Central Hudson*, 447 U.S. at 564. The facts of this case demonstrate that sections 1304 and 1307 constitute ineffectual means of reducing lottery participation by the North Carolina residents in Power 94's service area because the North Carolina residents within the area of Power 94's signal receive most of their radio, newspaper and television communication from Virginia-based media. It is probably true that a relatively small number of North Carolina listeners who listen only or mainly to Power 94 may hear significantly less lottery advertising because of their allegiance to that station, and that other North Carolinans may hear slightly less lottery advertising because they occasionally listen to Power 94. However, those possibilities do not sufficiently constitute "direct advancement" of the state's interest under the third prong of the *Central Hudson* test which makes clear that "conditional and remote eventualities simply cannot justify silencing . . . promotional advertising." *Id.* at 569. In *Central Hudson*, the Supreme Court held that New York State did not meet its burden of demonstrating that a ban on utility company advertising would directly advance the goal of promoting fair and efficient rates. *Id. See also Bolger*, 463 U.S. 60, 73 (1983), in which, dealing with a First Amendment challenge to a federal postal ban on the mailing of unsolicited contraceptive advertisements, the Supreme Court rejected the state's premise that the regulation sufficiently advanced the goal of aiding parents' efforts to supervise their children's birth control education. Since parents already largely control the receipt of household mail, and since children are exposed to significant external in-

formation, the statute offered "only the most limited incremental support for the interest asserted," and thus, failed First Amendment scrutiny. *Id.* at 73.[5]

Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court insisted that a state government must identify a direct link between the interest asserted and the regulation at issue. Rejecting the argument of the State of Ohio than a ban on the use of illustrations in attorney advertising advanced the goal of preventing deceptive promotion of legal services, Justice White observed that "acceptance of that State's argument would be tantamount to adoption of the principle that a state may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of such advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force." *Id.* at 649.

Like the prohibition in *Zauderer*, the application of section 1304 to Edge can only speculatively advance the goals of the State of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of "remote" support rejected in *Central Hudson*

---

[5] *Bolger* does suggest, however, that a broadcast ban on contraceptive advertising may perhaps pass First Amendment scrutiny on the grounds that parents have less control over the television viewing habits of their children than with regard to receipt and reading of mail by children. 463 U.S. at 74.

as not "directly advanc[ing]" either interests of federalism or limitations on lottery sales. *Central Hudson*, 447 U.S. at 564.

At most, the goals of sections 1304 and 1307 are only implicated in this case with respect to the 8% of Power 94's listening audience which resides in the nine counties of North Carolina within the station's signal. The population of those nine counties is 127,000, less than 2% of North Carolina's total population, but still a sizeable population group. However, a significant number of residents of that area listens to broadcasts of Virginia-based radio station, views Virginia-based television and reads Virginia newspaper advertising. Thus, application of section 1304's advertising ban to the activities of Power 94 hardly more than "remotely" and "marginally" advances the goals of the State of North Carolina to limit the knowledge of North Carolinians about the Virginia lottery. According to Arbitron estimates, 79% of all radio stations whose broadcast signals reach the nine North Carolina counties served by Power 94 are licensed to Virginia locations and may advertise Virginia lottery promotions; approximately 62% of all radio listening by residents in those counties is directed to radio stations licensed to locations in Virginia; and 38% of the radio listening in the Power 94 service area is directed at stations which broadcast lottery advertising. Only 11% of the radio listening in the nine-county area is directed at Power 94. Thus, in fact, radio listeners in that area are more than three times more likely to be listening to a station broadcasting Virginia lottery promotions than to Power 94.

Also, residents of the nine-county area are exposed to significant lottery advertising on television. Sur-

veys [6] indicate that while American adults spend 29% of their media consumption time listening to the radio, they spend 60% watching television. Not surprisingly, the Virginia Lottery Board has spent nearly half of its advertising budget on television time, including purchases from four Norfolk area television stations. Those stations enjoy large audiences in the nine-county Power 94 service area, as well as in sections of North Carolina not reached by Power 94's signal. Within the nine counties, Arbitron estimates that more than 75% of all television viewing in four of those counties is directed at Virginia stations; between 50 and 75% is directed at Virginia stations in three counties; and between 25 and 50% is so directed in two counties. Therefore, sections 1304 and 1307, at most, have only a remote impact on Virginia lottery sales among North Carolina residents, and can hardly be said "directly [to] advance" the federal government's interests in supporting the goals of the State of North Carolina. Further, newspaper advertising by the Virginia press is a source of additional exposure to lottery advertising in North Carolina. In the nine-county area, the circulation of two Virginia-based newspapers is approximately 10,400 newspapers daily and 12,500 on Sundays.

In sum, North Carolinians in Power 94's service area experience pervasive exposure to Virginia lottery advertising through telecast, broadcast and print media. Presumably, the State of Virginia and local Virginia-based lottery outlets determine their advertising budgets and allocate purchases of advertising

[6] These statistics are taken from surveys conducted by the Television Bureau of Advertising and are set forth in the joint stipulation of facts submitted by both sides in this case.

among available broadcasters. Thus, if Power 94 cannot air lottery promotions, advertisers will simply purchase from other broadcasters, and other media, which direct their messages into the area of North Carolina reached by Power 94. Ultimately, the application of sections 1304 and 1307 does not substantially reduce the volume of advertising about the Virginia lottery which reaches residents of North Carolina. Thus, those statutory provisions fail materially to protect North Carolina residents from the harms which may result from lottery advertising. Given that degree of ineffectiveness, those provisions do not meaningfully address the concerns of North Carolina or federalism's concerns for those state interests, and do not pass muster under the third prong of the *Central Hudson* test. Accordingly, although, for reasons stated *supra*, the challenged federal statutory proscriptions do pass muster under the first two standards of *Central Hudson*, and for reasons stated *infra*, under the fourth standard of that case, Edge is entitled to the relief it seeks herein.

Under the fourth prong of the *Central Hudson* test, a restriction on commercial speech may be "no more extensive than necessary to further the state's interest," 447 U.S. at 569-70. Edge contends that because the federal government's interests could be met by dropping section 1304 and leaving regulation of lottery advertising to the states themselves, the statute fails to meet that standard.

If the *Central Hudson* framework is construed as imposing a "least restrictive alternative" requirement, then that argument by Edge might succeed. But that interpretation is not permitted by *Board of Trustees of the State Univ. of New York v. Fox*, —— U.S. ——, 106 L.Ed.2d 388 (1989), in which Justice

Scalia construed the fourth *Central Hudson* standard as establishing "something short of at least restrictive means standard," *id.* at 401, and described it as one based on "reasonable" legislative judgment, necessitating "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served;' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 404 (citation omitted).

The statutory scheme put in place by sections 1304 and 1307 is not unreasonable. Presumably, in many instances, broadcasters located in non-lottery states will serve substantial populations in those states; under such circumstances, there may well be a "fit" between the statute and its objective. Short of leaving regulation to the states, it is difficult to envision a more narrowly-tailored set of provisions than those set forth in sections 1304 and 1307. Accordingly, those sections do pass muster under *Fox*'s relaxation of the fourth *Central Hudson* standard.

The conclusion, however, as indicated *supra*, does not validate the application of sections 1304 and 1307 to Power 94, because that application violates *Central Hudson*'s third-prong. And, that remains true despite the availability to the government of certain language in *Posadas*, 478 U.S. 328, which arguably supports the opposite conclusion.

V.

In *Posadas*, in the course of applying the four-pronged *Central Hudson* test, Justice Rehnquist concluded that the advertising concerned a lawful activity, was not misleading, and met *Central Hudson*'s

first test. *Id.* at 340-41. Then, he determined that Puerto Rico's interest in protecting the safety and welfare of its residents from the harms associated with gambling was a substantial interest and was valid under the second test. *Id.* at 341. As to the third prong of *Central Hudson*, Justice Rehnquist concluded that the Puerto Rico legislature's premise that the restriction on advertising would decrease gambling was reasonable and that its implementation directly advanced the purpose of the legislation. *Id.* at 343. Finally, as to *Central Hudson*'s fourth prong, viewing the statute as construed by Puerto Rico's Supreme Court, the Justice concluded that the statute was no more restrictive than necessary. *Id.*[7]

The casino which challenged the constitutionality of the statutory application argued that Puerto Rico's legislature having itself legalized casino gambling, could then not attempt to reduce demand for gambling by restrictions upon advertising. Disagreeing, Justice Rehnquist stated that "it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising," *Posadas*,

---

[7] The statute and regulations at issue in *Posadas* barred advertising of casino gambling "to the public of Puerto Rico." P.R. Laws Ann. tit. 15, § 77 (1972). While Puerto Rico's state tourism company interpreted the law to bar use of the work "casino" in any advertising which might reach Puerto Rican residents, the Superior Court of Puerto Rico devised a narrowing construction of the statute limiting its prohibition to advertisements intended to "attract the resident" of Puerto Rico. That construction was adopted by Puerto Rico's Supreme Court and accepted by the Supreme Court of the United States. *Posadas*, 478 U.S. at 339.

478 U.S. at 346, and that only "a strange constitutional doctrine . . . would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." *Id.* Relying on that language, the government suggests in this case that, under *Posadas*, commercial speech concerning activities which a state may ban entirely has no First Amendment protection, and that, therefore, restrictions upon advertising of casino gambling, cigarette and alcohol sales, prostitution, and lotteries are not violative of the First Amendment.

Justice Brennan, joined by Justices Marshall and Blackmun in dissent, expressed the view that the majority decision gives "government officials unprecedented authority to eviscerate constitutionally protected expression." *Id.* at 358-59.[8] Justice Stevens, also dismissing, commented that "[w]hether a State may ban all advertising of an activity that it permits but could prohibit—such as gambling, prostitution, or the consumption of marijuana or liquor—is an elegant question of constitutional law." *Id.* at 359. Against that background, during recent hearings concerning section 1304 and related statutory provisions, a Justice Department representative stated that the *Posadas* analysis "certainly contrasts with the approach in *Central Hudson*" and that "it remains to be seen whether the Court in future cases will take" the established *Central Hudson* approach, or rely on

[8] Justice Brennan in his dissent described *Posadas* as "dramatically shrinking the scope of First Amendment protection available to commercial speech." 478 U.S. at 358-59.

Posadas' blanket deference to the legislature.[9] Commentators have also raised questions with regard to what they believe is an inconsistency between Justice Rehnquist's approach in *Posadas* and the standards of *Central Hudson.*[10] To date, however, as far as this Court is informed, neither the Supreme Court nor any lower federal court, in the wake of *Posadas*, has yet held a commercial speech restriction constitutional which would not have passed scrutiny under the traditional *Central Hudson* tests.[11] Accordingly, this Court, in this case, follows *Central Hudson*, and concludes, for the reasons set forth *supra*, that the challenged federal statutory provisions as applied to Power 94 are violative of the third prong of *Central Hudson.*

V. [*sic*]

There remains the question of whether such a holding could and should be avoided by the adoption

[9] Testimony of Douglas W. Kmiec, Dep. Asst. Att'y General, Dept. of Justice, Hearings before the House Judiciary Comm., House Report 100-577, Lottery Advertising Clarification Act of 1988, 100th Cong., 2d Sess. (1988) p.11-12.

[10] D. Lively, "The Supreme Court & Commercial Speech," 72 Minn. L. Rev. 289 (1987); M. Nutt, "Recent Developments in First Amendment Protection of Commercial Speech," 41 Vand. L. Rev. 173, 205 (1988); F. Schauer, "Commercial Speech and the Architecture of the First Amendment," 56 U. Cinn. L. Rev. 1181, 1182 (1988); "The Supreme Court—Leading Cases," 100 Harv. L. Rev. 100, 177-78 (1986) ("Had Justice Rehnquist applied the *Central Hudson* test with vigor, he would have struck down Puerto Rico's law on the ground that it was enacted in pursuit of too insubstantial a purpose to justify the interference with individual choice.").

[11] Nor have the cases which have cited *Posadas*, *see, e.g.*, *U.S. Postal Service v. C.E.C. Services*, 869 F.2d 184, 187 (2d Cir. 1989); *Hillman Flying Service, Inc. v. City of Roanoke*, 652 F. Supp. 1143, 1149 (W.D. Va. 1988), indicated any conflict between *Posadas* and *Central Hudson.*

of narrow constructions of sections 1304 and 1307. Such an approach is generally favored by the courts, *DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, —— U.S. ——, 99 L.Ed.2d 645, 654-55 (1988), and was utilized in *Posadas*, 478 U.S. at 339. Two such constructions are possible: (1) an interpretation of section 1304 eliminating prohibitions on noncommercial speech from the scope of those statutes; and (2) a reading of section 1307 which bars non-lottery state broadcasters only from airing advertising directed at their own residents.

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657 (1895). That rule has recently been characterized as a "cardinal principle" which "has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 12 Cranch 64 (1804), and has for so long been applied by this Court that it is beyond debate." *DeBartolo*, —— U.S. ——, 99 L.Ed.2d at 654. Indeed, the rule is brought into play "so as to avoid not only the conclusion that [a statute] is unconstitutional, but also grave doubts upon that score." *Moore Ice Cream v. Rose*, 289 U.S. 373, 379 (1932). Nevertheless, it is not easy to cite to firm guidelines as to when a given constitutionally dubious statute may be amendable to a narrowing interpretation. In *Crowell v. Benson*, 285 U.S. 22 (1932), Chief Justice Hughes wrote that when contemplating a narrowing construction, a court should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 62. However, Justice Cardozo later warned that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Moore*, 289 U.S. at 379.

Whether a potential narrowing construction is "fairly possible" or "disingenuous evasion" seemingly turns principally upon legislative intent. In *Moore*, the Court concluded that "the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *Id.* More recently, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), Chief Justice Burger looked to whether the possibly unconstitutional aspect of a statute was the product of "the affirmative intent of the Congress clearly expressed." *Id.* at 501, quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

In this case, as discussed *supra*, the government does not object to a narrowing construction by which section 1304 is read to cover advertising only and to exclude news. As discussed *supra*, any interpretation of section 1304 which includes a ban on noncommercial speech would render that section unconstitutional Moreover, a construction excluding noncommercial speech from the scope of the statute is "fairly possible." Nothing in the recent legislative history of the federal lottery statute suggests that Congress intended to prohibit the broadcast of lottery information not designed to increase lottery participation.[12]

The second proposed narrowing construction, however, poses considerably greater problems, and materially affects section 1307's exemption for advertising "concerning a lottery conducted by a State acting under the authority of State law . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery." That provision, under the suggested

[12] That history dates from the early 1970's when states first authorized lotteries.

second narrowing construction, would be read to permit broadcasters licensed to non-lottery states—and thus not falling within the specific language of the exception—to air Virginia lottery advertising not directed to North Carolina residents.

Edge contends that that type of construction is similar to the interpretation given in *Posadas* to the Puerto Rico gambling statute by the Superior Court of Puerto Rico. That court narrowly construed a general ban on all advertising of casino gambling "to the public of Puerto Rico" so as to forbid only advertisements "contracted with an advertising agency, for consideration, to attract the residents to bet at the dice, card, roulette and bingo tables." *Id.* at 355. Edge asserts that *Posadas* bestows a kind of "imprimatur" upon a similar narrowing construction of section 1307 by this Court. However, the language of the statutes and the respective circumstances surrounding their enactment are dissimilar.

In *Posadas*, the Court was confronted with general statutory language, to which the Puerto Rican Court supplied specific terms. Moreover, it is practically feasible to identify a series of distinct forms of advertising directed at tourists who, largely, while in Puerto Rico, reside at resort hotels and speak a different native language than do many Puerto Rican residents. In contrast, section 1307's highly specific language expressly exempts a carefully defined set of broadcasters from section 1304's provisions. The basis for the exemption, location of license, accords with the long-standing concept of "community of license" which has been central to the FCC's licensing scheme since the enactment of the Communications Act of 1934. It is not "fairly possible" to interpret that language in a manner which ignores that

statutory concept. In addition, it hardly seems possible for advertising to be designed which will induce Virginian listeners to participate in the lottery and at the same time not attract North Carolina residents. Both groups are members of the same listening audience, and Edge has not provided—and seemingly cannot provide—any evidence of demographic or other differences, or in the content of lottery advertising, which would make advertising directed to non-North Carolinians feasible. In short, the *Posadas* solution cannot be comfortably grafted on the situation in this case.

Perhaps even more important is the fact that the legislative history of sections 1304 and 1307 does not permit such a narrowing construction. Prior to 1974, section 1304 barred the broadcast of all lottery advertising. In that year, section 1307 was added to provide the exceptions currently in effect. In crafting those exemptions, Congress considered a number of alternatives,[13] and was well aware, as the House Report reveals, that basing exceptions upon license location would create inequities, since "broadcast signals, as a technological matter, cannot be confined to political boundaries." [14]

In the 1974 amendments, Congress sought primarily to rectify the situation in which "the policy determinations of some States in authorizing a lottery are inhibited by provisions of Federal law even though the lottery functions only in that State." [15] The House

---

[13] H. Rep. No. 93-1517, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7007, 7010, 7022 [hereinafter cited as H. Rep.].

[14] Letter of FCC Chairman Richard E. Wiley, H. Rep. at 7021.

[15] H. Rep. at 7010-11.

Judiciary Committee specifically acknowledged that section 1307 was an imperfect solution: "in considering this legislation the committee was faced with the task of making a reasonable balance between Federal and State interests in this area," *id.* at 7011, and opted in favor of "protection of the policies and the interests of the States which do not provide for such lotteries." *Id.*

Initially, in 1974, the proposed legislation which became section 1307 limited lottery advertising to stations "located in" lottery states. The FCC then recommended the use of location of license as a more precise criterion, and a letter to the Committee from the FCC chairman set forth the reasoning and implications of that distinction.[16] At that point, the Committee amended its initial draft to include license location language.[17]

In 1988, Congress enacted a series of amendments which permitted lotteries sponsored by nonprofit organizations.[18] The initial proposed amendments in that year[19] contained a provision which would have expanded the section 1307 exemption to all advertising concerning any lottery "conducted by a State acting under the authority of state law," and would have therefore eliminated reliance upon the license location. During hearings, testimony was presented by representatives of the Justice Department and the FCC supporting such an amendment on the ground

---

[16] *Id.* at 7021-22.

[17] *Id.* at 7007.

[18] P.L. 100-625, The Charitable Games Advertising Clarification Act of 1988.

[19] *See* P.L. 100-625, HR 3146.

that the existing law produced inequitable results,[20] and the President of the National Association of Broadcasters specifically testified at House Judiciary hearings to the problems experienced by broadcasters —like Edge—licensed to locations near state borders.[21]

The bill did pass the House without the language keyed to location of license. However, in the Senate, the bill was amended to remove the changes in section 1307 concerning broadcast of lottery advertising and to retain language keyed to license location. Eventually, the House concurred with the Senate's action. Thus, Congress, having reconsidered the explicit exemption scheme of section 1307 once again in 1988, essentially ratified it.

In sum, the legislative history of the 1974 and 1988 amendments to the lottery statute reveals that the specific provisions of the section 1307 exception are the result of "the affirmative intention of the Congress clearly expressed." *Catholic Bishop*, 440 U.S. at 501. In that context, it is just not "fairly possible" to construe those provisions so as to ignore Congress' decision to regulate the broadcast of lottery advertising according to the license location of the broadcaster. Accordingly, a contrary narrowing construction, which would avoid the invalidation of the application of sections 1304 and 1307 to Power 94, is not appropriate. In this case, such invalidation is therefore required for the reasons stated *supra*.

---

[20] H. Rep. 100-557, 100th Cong., 2d Sess., statements of Dennis Patrick, FCC Chairman, at 7 and Douglas W. Kmiec, Dep. Asst. Attorney General, Dept. of Justice at 9-10 (1987).

[21] Lottery Advertising Clarification Act of 1988, Hearings on H.R. 3146 before the Subcomm. on Ad. Law and Government, House Comm. on the Judiciary, 100th Cong., 2d Sess. 57 (1987) (Testimony of Edward O. Fritts).

CONCLUSION

This Court will enter a Decree in this case construing sections 1304 and 1307 as relating only to commercial speech and holding that the application of sections 1304 and 1307 to Edge's operation of Power 94 is constitutionally invalid as to commercial speech.

/s/ F. A. Kaufman
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS

DECREE

The provisions of 18 U.S.C. §§ 1304 and 1307 do not apply to noncommercial speech and apply only to commercial speech. Further, the application of those statutory provisions to the operation of Power 94 by Edge Broadcasting Corporation (Edge) is unconstitutional insofar as commercial speech is concerned. Accordingly, Edge may operate Power 94 without being subject to the restrictions of those statutes, and defendants are hereby enjoined from taking any action to the contrary. It is so ORDERED, this 23rd day of February, 1990.

/s/ F. A. Kaufman
Senior United States District Judge

APPENDIX D

FILED: May 20, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2668

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS-APPELLANTS

ORDER

Upon a request for a poll of the court on the suggestion for rehearing en banc, Judges Russell, Widener, Murnaghan, Sprouse and Niemeyer voted in favor thereof, and Judges Ervin, Hall, Phillips, Wilkinson, Wilkins, Hamilton, Luttig and Williams voted against.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

Judges Chapman and Haden concur in this order. Judge Widener dissents. He would grant rehearing.

/s/ H. E. Widener, Jr.
For the Court

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part as follows:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 18 U.S.C. 1304 provides as follows:

Broadcasting lottery information

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

3. 18 U.S.C. 1307 provides as follows:

Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45559

No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF IN OPPOSITION

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a ban on commercial speech that is wholly ineffective in promoting a governmental interest when applied to a particular speaker violates the First Amendment to the United States Constitution?

TABLE OF CONTENTS

CITATION OF AUTHORITY

No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts of this case are characterized by their uniqueness. Edge Broadcasting Company ("Edge") owns WMYK-FM, "POWER 94," a 100,000-watt radio station. POWER 94 is licensed by the FCC to Elizabeth City, North Carolina and broadcasts from Moyock, North Carolina, a town about three miles south of the North

Carolina/Virginia border.[1] (JA 180). POWER 94 has a dual identification of Elizabeth City and Virginia Beach, Virginia. Its studios and corporate offices are located in Virginia Beach. (JA 180).

Ninety-two and two-tenths percent (92.2%) of the people comprising POWER 94's listening audience live in Virginia. Seven and eight-tenths percent (7.8%) live in North Carolina. POWER 94's signal reaches nine North Carolina counties but fewer than 2% of all North Carolinians live in these counties. (JA 188-89). The Commonwealth of Virginia operates a lottery;[2] the State of North Carolina does not.

Section 1304 of the United States Criminal Code forbids radio stations from broadcasting any information, prize lists or advertising concerning any lottery. A broadcaster who violates Section 1304 is subject to criminal and regulatory penalties, including imprisonment, fines and license revocation. Under Section 1307, however, radio stations may broadcast material concerning state-sponsored lotteries if the stations are licensed to a location in the lottery state or an adjacent lottery state. Since POWER 94 is licensed to a non-lottery state, it falls within the ban.

North Carolina residents who live within POWER 94's broadcast area listen to broadcasts of Virginia-based radio stations, view Virginia-based television and read

---

[1] Record citations are made to the Joint Appendix filed with the Court of Appeals.

[2] *See Va. Code* § 58.1-4001 (1987), authorizing the Commonwealth to sponsor a lottery.

Virginia newspapers. (JA 188). Seventy-nine percent (79%) of all radio stations whose broadcast signals reach these counties are licensed in Virginia; approximately sixty-two percent (62%) of all radio listening in these counties[3] is directed to radio stations licensed to Virginia. (JA 189).

During a given week in which the Virginia lottery advertises an instant game, for example, the radio stations[4] advertising the lottery air, on the average, 12 lottery advertisements each day and reach, in any given quarter hour of radio, an audience of 4,400 North Carolinians over the age of 18. During a typical advertising period for one instant game, these Virginia stations aired 452 60-second spots advertising the lottery. This type of advertising will run continuously so long as Virginia has a lottery. (JA 190; 39-40). In addition, vast numbers of Virginia advertisers include their affiliation with the lottery in their promotional messages.

The residents of this part of North Carolina are also exposed to Virginia lottery advertising on television, the dominant informational media. The four Hampton Roads area television stations which air Virginia lottery advertising enjoy large audiences in the nine-county POWER 94 service area and beyond.[5] Seventy-five percent of all

---

[3] The counties are Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank and Perquimans. (JA 188).

[4] The stations are: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. (JA 188).

[5] These stations are: WAVY, WVEC, WTKR, and WTVZ. (JA 190).

television viewing in four of these counties is directed to Virginia stations; between 50% and 75% is directed to Virginia stations in three counties; and between 25% and 50% is directed to Virginia stations in two counties. (JA 191-193). With an average of 274 television ads airing during a typical advertising campaign for an instant game, and with lottery news stories broadcast as a matter of course, virtually every North Carolinian living in the part of North Carolina reached by POWER 94's signal is exposed to the Virginia lottery. (JA 191).

The North Carolinians residing in POWER 94's service area are also supplied with Virginia lottery advertising by the Virginia newspapers which serve the area. These papers carry Virginia lottery advertising and circulate approximately 10,400 newspapers daily, 11,250 on Saturday, and 12,500 on Sundays. (JA 196).

Advertising the Virginia lottery is big business, both for the Virginia Lottery Board and for the many private retailers affiliated with the lottery. Excluding the cost of production, for example, the Lottery Board spent $1,202,905.00 on its introductory advertising campaign. It spent a total of $4,354,199.00 to promote its first three instant games. At the time of the trial, it anticipated spending about $2.3 million to introduce its on-line games and about $3 million a year to sustain them. (JA 39-40; 185-86).

Both the Lottery Board and private businesses advertise the lottery extensively in Hampton Roads. The Virginia Lottery Board buys advertising from seven Hampton Roads radio stations, four television stations, and three newspapers. (JA 188, 190, 195). As of the time

of trial, there were approximately 1,414 Hampton Roads businesses selling lottery tickets. Many of these outlets trumpet their status as lottery retailers in their advertising. (JA 41; 196).

Like other Americans, North Carolinians have great appetites for television and radio. Television viewers and radio listeners alternate between various stations. The same people who watch television also listen to the radio and read newspapers. (JA 14-15). In the average American household, the television set is turned on for seven hours and eight minutes per day. (JA 193).[6]

Ninety-nine percent of all American households have radios. In these households, the inhabitants have an average of 5.6 radios per household. Sixty-one percent (61%) of all adults have radios at work and listen to the radio fifty-three percent (53%) of the time. Ninety-five percent (95%) of all automobiles have radios, and seventy-seven percent (77%) of all adults are reached every week by car radio. (JA 194-195). Ninety-six and one percent (96.1%) of all American men and ninety-five and seven-tenths percent (95.7%) of all American women over the age of 18 listen to the radio during any given week.[7]

---

[6] Men watch television on the average of four hours and 14 minutes a day; women, an average of five hours and 12 minutes a day; teenagers, between the ages of 12 and 17, watch an average of three hours and eight minutes a day; and children, between the ages of 2 and 11, watch an average of 3 hours and 40 minutes a day. (JA 194).

[7] American men listen an average of 2.55 hours every day; American women listen an average of 2.53 hours a day. All Americans over the age of 12 listen to the radio for an average of three hours a day. (JA 194-195).

The impact of the laws on POWER 94 was severe. POWER 94 did not broadcast any Virginia lottery information at all because it feared that it would be prosecuted or subjected to administrative penalties. (JA 203-204). It refrained from airing any lottery press releases and any stories containing data on the why, how, when and where of the Virginia lottery because it could not predict what was permissible and what was not. (JA 204-208).

Of the 999 enterprises advertising on POWER 94 as of May 26, 1989, only 17 were located in North Carolina. Since .017% of POWER 94's advertisers live in North Carolina, its economic existence hinges on its ability to attract Virginia advertisers. The law prevented POWER 94 from carrying advertisements for Virginia businesses wishing to advertise their affiliation with the Virginia lottery. (JA 209). POWER 94, therefore, lost advertisers who wanted to include a reference to their affiliation with the Virginia lottery. (JA 161-164). Radio ads are generally prepared and taped in advance, and many POWER 94 advertisers would not alter their advertising copy to delete lottery related messages. (JA 160-164). POWER 94 had to refuse to broadcast such ads.

The government's ban on POWER 94 did not reduce the number of lottery ads broadcast. Advertising budgets are fixed. The advertiser apportions the budget among various competitors. When POWER 94 was not able to accept advertisements, the advertising simply went to another advertiser.

REASONS FOR DENYING THE WRIT

This case stands for the unsurprising proposition that a federal statute which silences one speaker out of many is unconstitutional if it advances no governmental interest whatsoever. The decisions below were based on a detailed factual record which empirically demonstrated the statutes' ineffectiveness in the peculiar situation at bar. What would have been surprising is a holding that the statutes are constitutional as applied even though they are totally ineffective.

The Fourth Circuit's decision is both narrow and *sui generis*. If any other litigant could prove, as Edge did, that a governmental regulation prohibiting it from speaking accomplished no governmental purpose, then the regulation would be unconstitutional as applied to that litigant. Because that factual scenario is exceedingly rare, the Fourth Circuit's decision does not make constitutional challenges more likely to succeed or even more likely to be brought.

It is probably fair to say that the only one who cares about this decision is Edge.[8] The Virginia Lottery has always been able to advertise extensively within the geographic area covered by Edge's signal. Prior to the decision, Edge was required to refuse any advertisement

---

[8] The fact that the decision is narrow is demonstrated by the lack of attention it has received. Neither the district court's opinion (732 F. Supp. 633) nor the Fourth Circuit's unpublished opinion have ever been cited. To Edge's knowledge, no other radio or television station in the United States has instituted suit seeking similar relief.

which mentioned the Virginia Lottery. However, the citizenry still heard the advertisements because they were broadcast by Edge's competitors. After the decision, Edge is permitted to broadcast such advertisements. The decision does not result in more advertising about the Virginia Lottery; it simply means that Edge can now receive a share of the Lottery's advertising budget. Edge's ability to carry lottery advertisements has no effect on any federal policies promoting or discouraging lotteries or promoting or encouraging federalism.

Application of the statute to Edge created a bizarre result. Edge and its numerous competitors reach the exact same audience. Because the competitors were licensed to Virginia, they were free to broadcast that which Edge was prohibited from transmitting. This disadvantaged Edge and advantaged Edge's competitors, but in no way advanced governmental interests. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), this Court held that where a statute banning speech did not directly advance a governmental interest, it was unconstitutional. The courts below did nothing more than apply *Central Hudson* to the facts of this case and reach the only constitutionally permissible result.

1. Application of the *Central Hudson* Test

a. Petitioner argues that the courts below failed to recognize that sections 1304 and 1307 are designed to serve not one interest, but two. Those interests are discouraging lottery participation in states that do not sponsor lotteries *and* accommodating lottery participation and

promotion in states that do. (Petition at 8). What Petitioner fails to note is that the statutes accomplish neither purpose when applied to Edge.

The district court rightly concluded that the goals of the federal laws are only implicated with respect to the 8% of POWER 94's listeners who live in the nine North Carolina counties reached by its signal. *Edge*, 732 F. Supp. at 640. The other 92% of POWER 94's listening audience are, of course, Virginians, who voted to create their own lottery. Narrowed down to these few North Carolinians, the question becomes: Does forbidding POWER 94 from advertising the Virginia lottery accomplish any governmental objective? The stipulated facts answered this question definitively.

Virginia radio and television signals bombard the area of North Carolina served by POWER 94 with Virginia lottery data. (JA 190-191). The Virginia television stations transmit into a larger area of North Carolina than does POWER 94. (JA 190). Sixty-four percent (64%) of all television viewing is directed to Virginia stations which air lottery ads. The district court found that in four of the counties more than 75% of all television viewing is directed at Virginia stations; between 50% and 75% is directed at Virginia stations in three counties; and in two counties, between 25% and 50% is so directed. (JA 191-193); *Edge*, 732 F. Supp. at 641.[9] The Virginia newspapers serving this area transmit news stories about the

---

[9] The figures are: Camden County, 89%; Chowan and Currituck Counties, 68%; Dare County, 42%; Gates County, 82%; Hertford County, 74%; Northampton County, 28%; Pasquotank County, 76%; and Perquimans County, 82%. (JA 191-193).

lottery and lottery advertisements across state lines. (JA 195). Both Virginia and North Carolina newspapers also regularly report news and information pertaining to the Virginia lottery. (JA 196).

The statistics supporting the district court's findings of fact are set forth in detail in the preceding Statement of the Case. The only conclusion they permit is the one drawn by the district court. Censoring Edge accomplishes nothing as a practical matter because the North Carolinians in its service area are already saturated with material about the Virginia lottery.[10]

b. Petitioner also argues that the courts below ignored *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). (Petition at 14). This case stands for the proposition that it is permissible to distinguish between offsite billboard advertising and onsite billboard advertising when evaluating a facial challenge to an ordinance. The holding has no application here. First, the difference between offsite and onsite billboard advertising is obvious. Onsite advertising is site specific. Offsite advertising is virtually

[10] The district court stated:

> Application of Section 1304 to Edge can only speculatively advance the goals of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of "remote" support rejected in *Central Hudson* as not "directly advanc[ing]" either interests of federalism or limitations on lottery sales.

Edge v. United States, 732 F. Supp. at 640.

unlimited. It is axiomatic that limiting billboard advertising to specific sites would be effective in promoting governmental interests. Furthermore, *Metromedia* involved a facial rather than an as-applied challenge. The empirical data submitted in this case was not present in *Metromedia*.

c. Faced with a record that overwhelmingly proves section 1307's ineffectiveness when applied to Edge, Petitioner seeks to redefine *Central Hudson*'s direct advancement test. Petitioner decries empiricism; it contends that evidence should be eschewed and factual findings treated as irrelevant. Petitioner argues that a wholly ineffective restriction on commercial speech must nevertheless be upheld if one can postulate a "logical" relationship between the restraint and the policies sought to be advanced. (Petition at 16).

Petitioner's argument confuses a facial constitutional challenge with an as-applied challenge. While a logical relationship may be enough to sustain the former,[11] this Court has repeatedly emphasized the need for a detailed factual record when considering the latter. As Justice White wrote recently, "as a general proposition, we can arrive at informed judgments only when we have a record showing the actual impact of the challenged statute." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 776 n.4 (1988) (White, joined by Stevens and

[11] As support for its logical relationship test, Petitioner cites *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) and *Metromedia*. (Petition at 16). Both cases involved a *facial* challenge to statutes restricting commercial speech. They have no applicability to the instant case, which was tried on an as-applied theory.

O'Connor, dissenting). As-applied adjudication enables a court to decide no more than necessary to dispose of a specific case and to avoid unnecessary confrontations with Congress. *Id.* It rests on the time tested advisability of having concrete, rather than hypothetical, cases.

In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), this Court recognized the appropriateness of an as-applied challenge to regulations involving commercial speech. Justice Scalia, writing for the majority, stated:

> We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial *and* noncommercial speech that is the subject of the complaint; and, if its application of speech *in either such category* is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

Id. at 486 (emphasis added). He explained: "We must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest." *Id.* at 495. Justice Scalia further explained:

> The Court of Appeals did not decide, however, whether [the law] directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think that remand was correct, since further factual findings had to be made.

Id. Thus, in *Board of Trustees* this Court expressly directed courts to perform the exact type of empirical analysis

performed by the district judge in this case and approved by the panel majority. *See also Peel v. Attorney Registration and Discipline Comm'n*, 496 U.S. 91 (1990) (following *Central Hudson* in examining empirical evidence in record to sustain an as-applied challenge to a restriction on commercial speech).

In essence what the government is requesting is nothing less than a reversal of *Central Hudson*, a reversal of *Board of Trustees* and a rejection of "as applied" adjudication. The government suggests abandoning the tried and true, pragmatic empiricism of as-applied adjudication and substituting for that adjudication a blind reliance upon governmental dogma. On the record in this case there is no conceivable way to find empirical support for the proposition that the statutes as applied to Edge advance any governmental interest of any kind. The courts below correctly applied existing law, and there is no reason for further review.

2. The Inapplicability of *Posadas*

Petitioner condemns the Fourth Circuit for its failure to discuss *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). However, the district court carefully discussed *Posadas*, 732 F. Supp. at 643, and ruled that *Posadas* expressly confirms *Central Hudson*'s continuing vitality.

In *Posadas*, this Court rejected a *facial* challenge to a Puerto Rican law prohibiting casino gambling advertising directed at Puerto Ricans but not tourists. Because the challenge was facial, there was no empirical data in the

record concerning the effectiveness of the statute.[12] Considering Puerto Rico's island geography and isolated locale, and the narrowing construction placed on the law by the Puerto Rico Superior Court, the Court refused to hold that the ban on advertising could never further the government's interest. The Court did not abandon *Central Hudson*; indeed, it cited *Central Hudson* as the controlling authority. 478 U.S. at 340.

Three years after *Posadas* was decided, this Court rendered its decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The Court again endorsed *Central Hudson*'s four prong test and, more importantly, expressly remanded the case for an as-applied application of two of those four tests to the specific facts there involved. *Board of Trustees*, 492 U.S. at 475-76.

There is nothing in *Posadas* which suggests that this Court has abandoned the well-established notion that regulations infringing on speech must be effective in promoting a substantial governmental objective in order to be sustained. There is nothing in *Posadas* which suggests that this Court would sustain a regulation that prevents one speaker from saying that which all others similarly situated can say. *Posadas* stands for nothing more than the unsurprising proposition that a facial challenge to a statute based upon speculative and non-

[12] The procedural posture of *Posadas* confirms the lack of a factual record. The appeal was from the grant of a Motion to Dismiss. *Posadas*, 478 U.S. at 330.

evidentiary conclusions is difficult since courts do not go out of their way to strike down legislation.[13]

3. Congress May Not Arbitrarily Favor One Speaker Over Another

Petitioner's final argument for granting the writ masquerades as one of logical inconsistency. Petitioner begins with the premise that Congress could lawfully ban any commercial speech regarding lotteries. Petitioner then reasons that if a tota! ban is constitutional, a partial ban must also be upheld. Petitioner even goes so far as to call the contrary rulings below "perverse." (Petition at 20-21)

Petitioner's argument fails to consider the fact that a complete ban on lottery advertising affects all speakers equally whereas the partial ban creates favored and disfavored speakers.[14] The factual record established that

[13] Petitioner suggests that the restriction in *Posadas* was just as ineffective as the restriction involved in the instant case. (Petition at 19). This is pure speculation. As was noted above, no evidence was ever taken in *Posadas* because the case involved a facial challenge to Puerto Rico's restriction on gambling advertisements. (*Supra* at 13-14).

[14] Although the courts below relied solely on the first amendment, the equal protection guarantee of the due process clause of the fifth amendment also forbids Congress from using the city of licensure as a basis for deciding which radio station may broadcast Virginia lottery advertising and information.

In an analogous case, *Okla. Broadcasters Ass'n v. Crisp*, 636 F. Supp. 978 (W.D. Okla. 1985), the court found that an Oklahoma ban on alcoholic beverage advertising was not rationally related to the asserted state interest in preventing the artificial stimulation of a demand for alcoholic beverages. The law failed the

discrimination between the two classes was unjustified in this case. The North Carolina residents in Edge's broadcast area are inundated with advertisements for and information about the Virginia lottery. Virginia radio stations, television stations and newspapers make the Virginia lottery a fact of life in this area. All section 1307 did in this case was silence one voice among many.

A law which deprives selected persons of their right to free speech must actually accomplish something. If the law does not directly advance a legitimate governmental interest, it is nothing more than a naked abuse of power. The Constitution does not allow the government to decide arbitrarily who may and may not utter identical words to the same audience. Permitting such an abuse of power would be the truly "perverse" result.

---

rational relationship test because the state was already inundated with alcoholic beverage advertising, despite the ban. Because of the flood of advertising, a ban directed against in-state advertising had such an attenuated link to the State's goal that the classification was arbitrary and irrational. *Id.* at 992. Like Oklahoma did in banning in-state advertising of a legal product, the government has violated POWER 94's equal protection rights by suppressing its lottery-related speech while permitting others to speak freely.

CONCLUSION

For the reasons stated, Respondent Edge Broadcasting Company respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500

Attorneys for Respondent
Edge Broadcasting Company

November, 1992

(3)

No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RENEE LICHT
Acting General Counsel
Federal Communications Commission
Washington, D.C. 20544

TABLE OF CONTENTS

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-486

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. Petitioners are seeking review of a decision by a court of appeals declaring an Act of Congress unconstitutional under the First Amendment. Invalidating a federal statute on constitutional grounds is "the gravest and most delicate duty" that a court is called on to perform. *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). Respondent nonetheless argues that review is unwarranted, despite the inherent gravity of the court of appeals' undertaking, because the decision below is "both narrow and *sui generis*." Br. in Opp. 7. In fact, it is neither.

In the course of holding 18 U.S.C. 1304 and 1307 unconstitutional as applied to respondent, the Fourth Circuit also invalidated the geographic bright line that separates lawful from criminal conduct under those statutes. Under the Fourth Circuit's decision, it is no longer constitutional for Congress to regulate broadcast lottery advertising by reference to a station's location, as Sections 1304 and 1307 do. Instead, to conform to the Fourth Circuit's view of the First Amendment, Congress would need to take account of the reach of a station's broadcast signal, the alternative media available to its audience, and the content of advertising in each respective medium. The consequence of this decision, if applied elsewhere, would disable Congress from adopting statutes drawing bright-lines to regulate the broadcasting of lottery advertising, since any such rule could be challenged on a station-by-station basis.

2. We explained in our petition that Sections 1304 and 1307 represent a considered effort to further two distinct interests—discouraging lottery participation in States that do not sponsor lotteries and accommodating lottery participation and promotion in States that do. Pet. 13. In determining whether Sections 1304 and 1307 satisfy the "direct advancement" prong of the test adopted in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), the relevant inquiry is whether the statutes represent a satisfactory effort to further those two divergent interests—an undertaking that, by its very nature, precludes Congress from giving unqualified weight to either one.

Respondent argues that Sections 1304 and 1307 serve neither interest when applied to respondent, because respondent's North Carolina audience is exposed to Virginia lottery advertising from a variety of other sources. Br. in Opp. 8-10. Respondent claims that, as applied, Sections 1304 and 1307 have no effect whatever on the exposure of North Carolina residents to Virginia lottery advertising, that Sections 1304 and 1307 "accomplish[] nothing," are "wholly ineffective," and "advance[] no governmental interest whatsoever," and that those statutes necessarily fail *Central Hudson's* direct-advancement test. Br. in Opp. 7, 10, 11. There are three flaws in that argument.

First, the record does not support respondent's repeated assertions that Sections 1304 and 1307 "accomplish nothing" as applied to respondent. The district court itself acknowledged that, as applied to respondent, Sections 1304 and 1307 probably *do* reduce the exposure of North Carolina residents to Virginia lottery advertising, albeit only to a limited extent. See Pet. App. 23a. In the district court's words, "[i]t is probably true that a relatively small number of North Carolina listeners who listen only or mainly to Power 94 may hear significantly less lottery advertising" because of Sections 1304 and 1307, and that "other North Carolinans may hear slightly less lottery advertising because they occasionally listen to Power 94." Pet. App. 23a. Thus, contrary to respondent's suggestion, Br. in Opp. i, this case does not present the question whether the First Amendment is violated by "a ban on commercial speech that is wholly ineffective * * * when applied to a particular speaker." The district court concluded that Sections 1304 and 1307 are not "wholly ineffective," even as applied to respondent.

Second, in applying *Central Hudson*'s direct-advancement test, respondent looks only at one of the

two statutory interests served here by Sections 1304 and 1307—the interest in furthering North Carolina's anti-lottery policy—and altogether ignores the other statutory interest—the interest in accommodating Virginia's state lottery. The statutes seek to advance both policies simultaneously, as they must in order to vindicate Congress's underlying goal of advancing federalism. Pet. 6, 13. Under these circumstances, it is inevitable that the statutes will not insulate respondent's North Carolina audience from Virginia lottery advertising as well as would a single-minded, flat ban on all lottery advertising. But that hardly means that Sections 1304 and 1307 fail to "directly advance" Congress's interests in this setting. The limited impact of the laws on North Carolina residents in this case is inherent in Congress's attempt to accommodate divergent state lottery policies. To hold this attempt unconstitutional would be to hold that one of the legitimate interests furthered by Sections 1304 and 1307 must be sacrificed by Congress to serve the other. Nothing in *Central Hudson* or its progeny requires that result, and respondent cites no authority to support any such claim.

Finally, the Court rejected a similar argument in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). New York City had adopted a noise ordinance requiring concert performers at a city park to use sound amplification equipment and a sound technician provided by the city. There, as in this case, the city offered divergent justifications for its rule: the interest in limiting sound volume for nearby residents, and the interest in ensuring that the sound volume was adequate for concert listeners. The Court held that "[i]t is undeniable that the city's substantial interest in limiting sound volume is served in a

direct and effective way by the requirement that the city's sound technician control the mixing board during performances." 491 U.S. at 800. The Court also held that the city's interest in ensuring that sound volume was adequate supported the city's regulation, even if the regulation were unnecessary in the case of the plaintiff's concerts, "which apparently were characterized by more-than-adequate sound amplification," *id.* at 801. As the Court explained, *ibid.* (citations omitted):

> [T]hat fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it.

The Court concluded that "[c]onsidering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline." *Ibid.*

The Court's decision in *Ward* v. *Rock Against Racism* undermines respondent's argument. Although *Ward* involved a "time, place, and manner restriction" on speech, this Court made clear in *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989), that "application of the *Central Hudson* test was 'substantially similar' to the application of the test for valid-

ity of time, place, and manner restrictions upon protected speech." Thus, the Court's ruling in *Ward* that "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case," 491 U.S. at 801, applies here as well. And when Sections 1304 and 1307 are analyzed in that manner, they clearly satisfy the *Central Hudson* test.

3. As we noted in the petition, Pet. 21, the decision below is especially troubling because it effectively sanctions Congress for relaxing a previously comprehensive ban on broadcast lottery advertising. Respondent finds such a result is defensible, on the theory that a comprehensive ban affects all broadcasters equally, while the partial lifting of broadcast restrictions brought about by Section 1307 "creates favored and disfavored speakers." Br. in Opp. 15-16. Respondent even suggests that the geographic distinctions drawn by Sections 1304 and 1307 offend not only the First Amendment, but equal protection principles as well. Br. in Opp. 15 n.14. That claim, which was not taken up by either of the courts below, is misguided for three reasons.

First, equal protection principles add nothing to the protections afforded by the First Amendment under *Central Hudson*. If the "fit" between statutory means and ends passes muster under *Central Hudson*, the demands of equal protection are necessarily satisfied as well. This Court made that point expressly in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 344-345 n.9 (1986); cf. *Fox*, 492 U.S. at 480.

Second, respondent's equal protection argument assumes that Sections 1304 and 1307, as applied here,

serve only to "silence one voice among many" without advancing any governmental interest. Br. in Opp. 16. But as explained above, it is both a factual and legal fallacy to claim that the statutes do not advance the government's interests as applied in this case. Also, far from silencing "one voice among many," Sections 1304 and 1307 forbid *all* North Carolina licensees from broadcasting lottery advertising. Respondent is not being singled out; instead, it is being subjected to a general geographic restriction that applies to all other broadcasters in the State. That restriction is an eminently sensible means of pursuing Congress's legitimate goals, and it does not violate equal protection principles merely because it is less effective in one instance than in others.

Third, both courts below held that Congress's interest in protecting the anti-gambling policies of non-lottery States is a legitimate and substantial interest; respondent does not argue to the contrary; and respondent does not contend that Congress cannot promote that interest by imposing restrictions on broadcast licensees. It therefore follows that Congress *does* have the authority to silence some speakers (*e.g.*, broadcasters in North Carolina) in favor of others (*e.g.*, broadcasters in Virginia) in order to achieve that interest. Any discrimination in this regard is thus the inevitable consequence of allowing Congress to balance competing interests.

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RENEE LICHT
Acting General Counsel
Federal Communications Commission

DECEMBER 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 60108

No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

SCOTT R. MCINTOSH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

RENEE LICHT
Acting General Counsel
Federal Communications Commission
Washington, D.C. 20544

QUESTION PRESENTED

Whether 18 U.S.C. 1304 and 1307, which restrict the right of a radio or television licensee to broadcast lottery-related advertisements, violate the First Amendment Free Speech Clause when applied to a licensee operating in a State that prohibits lotteries, but whose broadcasts extend into a State that operates a state lottery.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-486

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-9a, is unpublished, but the judgment is noted at 956 F.2d 263 (Table). The opinion of the district court, Pet. App. 10a-38a, is reported at 732 F. Supp. 633.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on May 20, 1992. Pet. App. 40a-41a. On

August 5, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 17, 1992. The petition was filed on that date, and was granted on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and 18 U.S.C. 1304 and 1307 are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

This is a First Amendment challenge by a radio licensee to Congress's regulation of the use of the airwaves to promote state-run lotteries. See 18 U.S.C. 1304 and 1307. Together, Section 1304 and Section 1307 create a bright-line geographic rule, under which a station's right to broadcast lottery advertising hinges on the State to which it is licensed: A station broadcasting from a State with a state-run lottery can broadcast advertisements about that State's lottery, or about any other state-run lottery. By contrast, a station broadcasting from a State without a state-run lottery cannot broadcast advertisements about any lottery. The validity of that bright-line rule is at issue in this case.

A. The Historical And Statutory Background

1. Lotteries have an ancient pedigree.[1] In pre-colonial England and during the early history of this nation, lotteries were a popular and respectable activ-

[1] The first king of Israel was chosen by lot. 1 *Samuel* 10:20-21.

ity.[2] Beginning in the Jacksonian period, lotteries fell into disfavor for various reasons, such as "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall."[3] In fact, the dominant 19th century view was that lotteries were harmful to society.[4] States thus began to restrict or prohibit both private and state-run lotteries.

A major obstacle to the States' reform efforts was their inability to regulate lotteries that operated across state lines. States lacked authority to prosecute

[2] See Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978); J. Ezell, *Fortune's Merry Wheel: The Lottery in America* 1-59 (1960); A. Spofford, *Lotteries in American History*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173-195 (1893); National Inst. of L. Enforcement & Crim. Just., LEAA, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776-1976*, at 1-2, 500-519 (1977) [hereinafter *Gambling*]; G. Sullivan, *By Chance a Winner: The History of Lotteries* 12-43 (1972); D. Weinstein & L. Deitch, *The Impact of Legalized Gambling: The Socio-economic Consequences of Lotteries and Off-Track Betting* 8-9 (1974).

[3] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927.

[4] See, *e.g.*, *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850), and *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880), both quoted at p. 22, *infra*; *Champion v. Ames* (*Lottery Case*), 188 U.S. 321, 355-356 (1903); J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, H.R. Misc. Doc. No. 210, 53d Cong., 2d Sess. Pt. 9, at 81 (1898) (Special Message to the Senate and House of Representatives from President Harrison) ("It is not necessary, I am sure, for me to attempt to portray the robbery of the poor and the widespread corruption of public and private morals which are the necessary incidents of these lottery schemes.").

lotteries conducted in another jurisdiction or to regulate use of the mails to distribute lottery tickets and advertisements. Because the States had to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task" [5]—they turned to Congress for help.

2. Congressional restrictions on lotteries date from 1827. In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars, or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress limited the prohibition to the mailing of letters or circulars concerning illegal lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. Four years later, however, Congress again extended the prohibition to all lotteries, including ones chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)); see *Horner* v. *United States*, 147 U.S. 449, 456, 466 (1893); *United States* v. *Noelke*, 1 F. 426, 427-429 (C.C.S.D.N.Y. 1880); *Lottery Circulars*, 15 Op. Att'y Gen. 203, 203-204 (1877).

The 1876 Act was challenged on the ground that it violated the First Amendment, but this Court rejected that argument in *Ex parte Jackson*, 96 U.S. 727 (1878). Nevertheless, the 1876 Act was widely viewed as an ineffective weapon against lotteries, particu-

[5] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931.

larly the then-infamous and powerful Louisiana Lottery, the only lottery still operating legally in 1890.[6] The Louisiana Lottery operated nationwide and used the mails as its principal means of obtaining revenues from the public in the other States,[7] deriving more than 90% of its multi-million dollar income from out-of-state bettors.[8] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers,[9] that law did not stop the Louisiana Lot-

[6] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries); 21 Cong. Rec. 8713-8714 (1890) (Rep. Evans). The Louisiana Lottery was chartered in 1868 ostensibly to raise funds for Charity Hospital in New Orleans. In fact, the lottery was directed by a New York gambling syndicate, which had bribed Reconstruction Era state legislators in order to obtain a charter granting the lottery a monopoly within the State. H. Asbury, *Sucker's Progress: An Informal History of Gambling in America from the Colonies to Canfield* 85 (1938); J. Ezell, *supra*, at 242-244; G. Sullivan, *supra*, at 52-56.

[7] *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. No. 22, 46th Cong., 2d Sess. 16 (1880) (Report from Assistant Attorney General Freeman to Postmaster-General Key); *id.* at 27-28 (Letter from New York City Post Office General Superintendent Forrester to New York City Postmaster James (Oct. 14, 1879)); *id.* at 28 (Letter from New Orleans Postmaster McMillen to Assistant Attorney General Freeman (Nov. 4, 1879)); *id.* at 28-29 (Letter from New Orleans Postmaster McMillen to Postmaster-General Key (Nov. 12, 1879)); 21 Cong. Rec. 8706 (1890); *id.* at 8711 (statement of Rep. Wilkinson); *id.* at 8717 (statement of Rep. Hitt); *id.* at 8721 (statement of Rep. Price); J. Ezell, *supra*, at 251.

[8] 21 Cong. Rec. 8706 (1890) (Rep. Moore); J. Ezell, *supra*, at 251; D. Weinstein & L. Deitch, *supra*, at 11.

[9] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885).

tery from soliciting customers through newspaper advertisements.

After several years of debate,[10] Congress closed that loophole by passing the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)). The constitutionality of that law was challenged in *In re Rapier*, 143 U.S. 110 (1892). Relying on *Ex parte Jackson*, *supra*, this Court upheld the 1890 Act over a First Amendment objection.

In response, the Louisiana Lottery moved its operations to Honduras and used a Florida express company to carry on its domestic business.[11] When Congress realized that the Louisiana Lottery still had not been shut down, Congress passed the Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (codified at 18 U.S.C. 1301), which outlawed transportation of lottery tickets in interstate or foreign commerce. The constitutionality of that Act was also challenged, and this Court, for the third time, upheld Congress's anti-gambling efforts in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903), this time over a claim that the statute exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

3. The 19th century federal anti-lottery legislation is still in effect today with respect to privately-run lotteries. The basic prohibition on the mailing or carrying in interstate commerce of lottery tickets or lottery advertisements survives as 18 U.S.C. 1301 and 1302. After the birth of radio and television, Congress enacted Section 316 of the Communications Act of 1934, ch. 652, 48 Stat. 1088, which prohibits radio and television stations from broadcasting "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. 1304, as amended by the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625,

---

[10] There was considerable debate on whether applying the 1876 Act to newspapers would violate the First Amendment. See J. Ezell, *supra*, at 251-263; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 937-940. Supporters of the 1890 Act argued that it was constitutional under *Ex parte Jackson*, see S. Rep. No. 1579, 51st Cong., 1st Sess. (1890); S. Rep. No. 233, 48th Cong., 1st Sess. 1 (1884); S. Rep. No. 11, 49th Cong., 1st Sess. 12 (1886); H.R. Rep. No. 2678, 49th Cong., 1st Sess. 1-2 (1886); H.R. Rep. No. 787, 50th Cong., 1st Sess. Pt. 2, at 2-4 (1888) (Views of the Minority); 21 Cong. Rec. 8710 (1890) (Rep. Caldwell); *id.* at 8712 (Rep. Wilkinson), and noted that newspapers generally did not oppose extending the 1876 Act to include their publications, see S. Rep. No. 1579, *supra*, at 3 ("Many of the ablest and most influential journals now advocate the denial of mail facilities to any publisher who will admit a lottery advertisement to his columns, and it is believed that an enactment by Congress to this effect will meet with the almost unanimous approval of papers of known standing and ability."). Opponents claimed that *Ex parte Jackson* did not sanction the exclusion of newspapers from the mails, and that excluding newspapers from the mails because they published lottery advertisements would establish a precedent that in the future could be used to exclude from the mails commentary that other Congresses found detrimental to the public. See S. Rep. No. 233, *supra*, at 13-15 (Views of the Minority); H.R. Rep. No. 826, 48th Cong., 1st Sess. 2-4 (1884); H.R. Rep. No. 2678, *supra*, at 4-6 (Views of the Minority); H.R. Rep. No. 787, 50th Cong., 1st Sess. 1 (1888). Supporters of the 1890 Act ultimately carried the day.

[11] J. Ezell, *supra*, at 263-264, 267-268; G. Sullivan, *supra*, at 58; D. Weinstein & L. Deitch, *supra*, at 12; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 940-941; see *Report of the Postmaster-General*, H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. Pt. 4, at 17 (1891).

§ 3(a)(4), 102 Stat. 3206. The Federal Communications Commission can revoke a broadcaster's license for violating Section 1304. 47 U.S.C. 312(a)(6). These sections in the Criminal, Postal, and Communications Codes generally outlaw use of the mails and the airwaves to promote privately-run lotteries.[12]

On the other hand, Congress has modified this regulatory scheme to reflect the renaissance of state-operated lotteries. In 1975, after the rebirth of state-run lotteries in New Hampshire, New Jersey, and New York, Congress allowed newspapers and broadcasters to advertise such lotteries if the newspaper or broadcast licensee is located in a State with a state-run lottery. See 18 U.S.C. 1307. Section 1307, as amended by the Charity Games Advertising Clarification Act of 1988, *supra*, § 2(a), 102 Stat. 3205, permits advertising about state-sponsored lotteries "by a radio or television station licensed to a location in that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress adopted that exemption "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974). Congress sought to "mak[e] a reasonable balance between Federal and State interests in this area," including "the consideration and protection of the policies and interests of the States which do not provide for such lotteries." H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974).

[12] Related provisions of Title 18 include: Section 1303, which prohibits any Postal Service officer or employee from acting as a lottery agent; Section 1305, which creates a special exemption for fishing contests; Section 1306, which bars financial institutions from selling lottery tickets for state-operated lotteries. Provisions in the Postal Code establish a procedure by which the Postal Service can refuse to deliver lottery-related materials. 39 U.S.C. 3001-3007.

4. This controversy over the constitutionality of 18 U.S.C. 1304 and 1307 arises from the different lottery policies of Virginia and North Carolina. North Carolina does not operate a state-run lottery and prohibits lotteries and lottery advertising. N.C. Gen. Stat. §§ 14-289, 14-290 (1991). By contrast, Virginia has had a state-conducted lottery since 1987, when Virginia voters approved a lottery by referendum. Va. Code Ann. §§ 58.1-4000 *et seq.* (1991 & Supp. 1992). The Virginia State Lottery Board spends millions of dollars each year on broadcast and print media lottery advertising, and private Virginia businesses purchase radio advertising identifying their status as lottery ticket outlets. Pet. App. 2a-3a, 12a-13a; J.A. 24-25. Under 18 U.S.C. 1304 and 1307, a broadcasting station licensed to Virginia locations may carry Virginia lottery advertisements, but a station licensed to North Carolina locations may not, even if its service area extends into Virginia.

B. The Proceedings In This Case

1. Respondent is a broadcasting corporation licensed by the FCC to operate an FM radio station in Elizabeth City, North Carolina, even though its studio and corporate offices are in Virginia Beach, Virginia. The station, whose call sign is WMYK (Power 94), broadcasts from Moyock, North Carolina, approximately three miles from the North Carolina-Virginia border. Due to its location, WMYK broadcasts to residents of both States. Roughly 127,000 North Carolina residents live in WMYK's service area.

Approximately 8% of its listeners reside in North Carolina, with the remainder in Virginia. WMYK's listeners comprise a small percentage of North Carolina's total population, and most of them receive information about the Virginia lottery from Virginia broadcast media and other sources. Pet. App. 2a, 6a, 10a-11a; J.A. 8, 26-27, 31-32, 45.

2. Respondent filed this action against the United States and the FCC in October 1988, five months after acquiring WMYK. Respondent asserted that 18 U.S.C. 1304 and 1307 violate its free speech rights under the First Amendment by preventing it from broadcasting Virginia lottery advertisements. Petitioners defended the statutes on the ground, inter alia, that they are lawful under *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986), and that they are a permissible regulation of commercial speech under the test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). The first inquiry under *Central Hudson* is whether the speech concerns a lawful activity and is not misleading. The second prong asks whether the government's interests in regulating the speech are "substantial." The third inquiry is whether the regulation "directly advances" the government's interests, and the fourth prong asks whether the government's regulation is no more extensive than is necessary to serve its interests. 447 U.S. at 566; see *Board of Trustees* v. *Fox*, 492 U.S. 469, 475-481 (1989). The last two steps "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas*, 478 U.S. at 341; *Fox*, 492 U.S. at 480.

Acting on a stipulated record, see J.A. 18-32, the district court held that Section 1304 and Section 1307

are unconstitutional as applied to respondent. Pet. App. 10a-38a. After noting that the first step of the *Central Hudson* test was not at issue, *id.* at 20a-21a, the court concluded that the government had a substantial interest in protecting the ability of "non-lottery states to discourage gambling," *id.* at 21a-22a, and that the regulatory scheme was a reasonable means of accommodating the interests of lottery and non-lottery States, *id.* at 27a-28a. Nevertheless, the court ruled that the broadcast restrictions in Sections 1304 and 1307 did not directly advance the government's interests, because "North Carolinians in Power 94's service area experience pervasive exposure to Virginia lottery advertising through telecast, broadcast and print media" in Virginia. Pet. App. 26a; see *id.* at 22a-27a. Because application of those statutes to WMYK does not "substantially reduce the volume of advertising about the Virginia lottery" that reaches North Carolina residents, the court ruled, they "fail materially to protect North Carolina residents from the harms which may result from lottery advertising," and therefore fail the third prong of the *Central Hudson* test. *Id.* at 27a. The district court also rejected the government's suggestion that "under *Posadas*, commercial speech concerning activities which a state may ban entirely has no First Amendment protection, and that, therefore, restrictions upon advertising of casino gambling, cigarette, and alcohol sales, prostitution, and lotteries are not violative of the First Amendment." *Id.* at 30a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-9a. The majority concluded that Sections 1304 and 1307 satisfied the second and fourth steps of the *Central Hudson* test, Pet. App. 5a-6a, 7a, but ruled that the laws do not "directly advance" the government's interests as applied to WMYK, *id.*

at 7a. Because "[t]he North Carolina residents who might listen to Power 94 are inundated with Virginia's lottery advertisements," the majority reasoned, "[p]rohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina residents from lottery information." *Id.* at 6a-7a.

Judge Widener dissented. Pet. App. 8a-9a. He reasoned that while WMYK's North Carolina audience might be exposed to lottery information from Virginia, "[t]he fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional." *Id.* at 9a. He also expressed doubt that the majority's ruling could be confined to what the majority called "the unique circumstances of this case." *Id.* at 6a, 9a. He pointed out that since "the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, * * * if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved." *Id.* at 9a.

SUMMARY OF ARGUMENT

I. Congress should be free to restrict commercial lottery advertising simply by virtue of its authority to restrict or ban lotteries and other forms of gambling, regardless of whether such a limitation satisfies the *Central Hudson* test. Sections 1304 and 1307 deny licensees the right to broadcast only a narrow category of commercial speech that plays a direct role in the conduct of an activity—gambling—that Congress and the States may discourage or suppress due to its potentially injurious activities. *Ex parte Jackson* and *In re Rapier* a century ago upheld prohibitions on the use of the mails to advertise lotteries,

and this Court in 1986 in *Posadas* upheld a similar restriction on the advertising of casino gambling. Society has long deemed advertising restrictions on activities like gambling or alcohol consumption reasonable because such restrictions are a necessary way to reduce consumer demand for an activity that is harmful, but cannot be brought to a halt.

II. Sections 1304 and 1307 are also constitutional under the standard that this Court announced in *Central Hudson* for determining the permissible bounds of the regulation of commercial speech. By limiting the commercial promotion of lotteries, the statutes advance the policies of those States that have forbidden private lotteries within their borders and that have declined to operate state lotteries. The two statutes are also narrowly tailored to advance the divergent interests of States that operate lotteries and those that do not, since broadcasters may advertise state-run lotteries if the State in which they are licensed operates one.

The courts below erroneously ruled that the statutes do not "directly advance" Congress's interests as applied to respondent because North Carolina residents receive advertisements about the Virginia Lottery from other sources. The courts below ignored the fact that the statutes serve two interests: discouraging lottery participation in States that do not sponsor lotteries *and* accommodating lottery participation and promotion in the States that do. That respondent's listeners hear advertisements about the Virginia Lottery from broadcasters licensed in Virginia, accordingly, does not undermine Congress's regulatory scheme. In addition, because Congress's regulation of commercial speech is not subject to strict

scrutiny, that regulation should be upheld if it directly advances Congress's interests at a national level; Congress should not have to defend its laws on a station-by-station basis. Finally, Sections 1304 and 1307 are not unconstitutional on the ground that they are underinclusive. Congress could reasonably believe that restricting the advertising of lotteries will reduce consumer demand for that activity, which thereby furthers the interest of States that oppose lotteries.

ARGUMENT

THE STATUTORY RESTRICTIONS ON BROADCASTING LOTTERY ADVERTISEMENTS CONSTITUTIONALLY REGULATE COMMERCIAL SPEECH PROMOTING LOTTERIES

The courts below held that 18 U.S.C. 1304 and 1307 were unconstitutional as applied to respondent under the test that this Court adopted in *Central Hudson* to determine the constitutionality of the government's regulation of commercial expression. For the reasons given in Point II below, we submit that those courts misapplied the *Central Hudson* test and that the judgment below should be reversed. Before addressing that question, however, we believe that the Court should address the logically prior question of whether government regulation of the particular type of commercial speech in question here—speech promoting gambling—is even subject to the *Central Hudson* test. For the reasons stated in Point I, we submit that the government should be free to regulate such commercial speech regardless of whether the government can satisfy the *Central Hudson* test. For that reason, too, the judgment below should be reversed.

I. CONGRESS HAS THE POWER TO RESTRICT OR PROHIBIT USE OF THE BROADCAST MEDIA FOR ADVERTISING OF GAMBLING BY VIRTUE OF CONGRESS'S AUTHORITY TO BAN GAMBLING ALTOGETHER

A. Congress Has Long Had The Authority To Prevent Federal Instrumentalities From Being Used For The Commercial Promotion Of Lotteries

Since 1827, there has been a long-standing federal policy to assist the States in their efforts to reduce public participation in lotteries by preventing federal instrumentalities from being used to promote such enterprises. It has long been illegal to import lottery tickets in foreign commerce, to distribute such tickets or lottery advertisements in interstate commerce or through the mail, and to broadcast such advertisements over radio and television. 18 U.S.C. 1301, 1302, and 1304. This Court has three times upheld the constitutionality of that regulatory scheme: This Court rejected a Commerce Clause challenge to what is now 18 U.S.C. 1301 in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903), and twice rejected First Amendment challenges to 18 U.S.C. 1302, in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892).

Ex parte Jackson involved a prosecution for depositing in the mails a letter containing a circular offering prizes in a lottery, in violation of the Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)), which prohibited the mailing of letters or circulars concerning lotteries. In upholding the Act against a First Amendment objection, this Court explained that "the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the

people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." 96 U.S. at 736. Analogizing the 1876 Act to a similar 1873 statute denying use of the mails to distribute obscene materials, the Court found that "[t]he same inhibition has been extended to circulars concerning lotteries, — institutions which are supposed to have a demoralizing influence upon the people." *Ibid.* The Court held that "we have no doubt" that it was lawful for Congress to do so. *Id.* at 737.

In re Rapier is to the same effect. There, the Court upheld the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)), over a First Amendment challenge. Like the 1876 Act, the Anti-Lottery Act of 1890 made it a crime to advertise lotteries through the mails. Relying on *Ex parte Jackson*, *supra*, the Court rejected the argument that the Act violated the First Amendment. 143 U.S. at 134-135; accord *Horner* v. *United States (No. 1)*, 143 U.S. 207, 213 (1892); *Horner* v. *United States (No. 2)*, 143 U.S. 570, 578 (1892).[13]

[13] Before Congress modified the scheme in 1975 in order to allow advertising of state-run lotteries by certain licensees, the Second and Third Circuits concluded that Congress could altogether prohibit commercial promotion of state-run lotteries. See *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), vacated and remanded on other grounds for consideration of mootness, 420 U.S. 371 (1975). The Second Circuit upheld the constitutionality of Section 1304 as applied to advertisements or information directly promoting a state-conducted lottery. 414 F.2d at 997, 998. The Third Circuit concluded that Section 1304 would be unconstitutional if it were applied to ban broadcasting of the winning number in a lawful state-run lottery, but also determined that it constitutionally could be applied to compensated broadcasts. 491 F.2d at 224. The Court granted certiorari to review the Third Circuit's ruling, but later ordered the case vacated and remanded for a determination of mootness after Congress adopted Section 1307. 420 U.S. 371 (1975).

More than a decade later, this Court noted probable jurisdiction over an appeal and a cross-appeal from the district court's decision in *Minnesota Newspaper Ass'n* v. *Postmaster General*, 677 F. Supp. 1400 (D. Minn. 1987), prob. juris. noted, 488 U.S. 815 (1988), which held that Section 1302 was constitutional as applied to advertisements, but was unconstitutional as applied to prize lists in news reports. After Congress passed legislation affecting the scope of Section 1302, and in light of the government's interpretation of the scope of Section 1302, the private-party plaintiff dismissed its challenge to Section 1302. See *Minnesota Newspaper Ass'n* v. *Postmaster General*, 488 U.S. 998 (1989) (plaintiff's-cross-appellant's voluntary dismissal under Sup. Ct. R. 53 of cross-appeal); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989) (dismissal of government's appeal as moot).

B. Developments In The Law Since *Ex parte Jackson* And *In re Rapier* Have Not Undercut Congress's Authority To Restrict The Commercial Promotion Of Lotteries

1. Since the Court last addressed the constitutionality of this regulatory scheme, there have been three important developments. The first is a societal change toward lotteries. For most of our history, the States were unanimous in the belief that lotteries, like other forms of gambling, were a disfavored activity and that the public should be foreclosed or discouraged from participating in them. Although the States generally still embrace that policy as to private lotteries, many States, facing budgetary problems, now operate state lotteries and—not surprisingly—

encourage the public to try the State's games of chance.

Paralleling that development is the second one: the emergence of a new congressional regulatory scheme for lottery advertising. Because of the birth of state-run lotteries, Congress has partially lifted the advertising barrier in the Criminal, Postal, and Communications Codes in order to accommodate what has become a divergent set of interests possessed by States that run lotteries and States that do not. Under the current regulatory scheme, a radio or television station broadcasting from a State with a state-run lottery can broadcast advertisements about that lottery or any other state-run lottery, while a station that broadcasts from a State without a state-operated lottery cannot broadcast lottery advertisements about any lottery. The laws in question, 18 U.S.C. 1304 and 1307, use a geographically-based bright line to draw that distinction.

The last important development is the birth of the commercial speech doctrine. At one time, commercial speech was thought not to implicate the First Amendment at all. See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). Since 1976, however, commercial speech has been entitled to some degree of constitutional protection. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Broadcasters also enjoy First Amendment protection. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984).

2. In light of these three developments, the question is whether Congress may still exclude from the mails and the broadcast media certain expression associated with gambling. The answer is yes. Although some of the language in *Ex parte Jackson* and

In re Rapier about the scope of government's regulatory power would have to be qualified today, the holdings of those cases—that Congress may use its power over interstate instrumentalities to assist the States in the regulation of lotteries—remain fully valid.

a. The Court has made clear that government may regulate or ban speech that is fraudulent or that proposes an illegal transaction. See, *e.g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Friedman* v. *Rogers*, 440 U.S. 1, 9-10 & n.9 (1979); *Central Hudson*, 447 U.S. at 563-564; *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).[14] Furthermore, the Court has made clear

[14] On several occasions this Court has upheld over First Amendment challenges the constitutionality of 39 U.S.C. 3005 and 3007, which authorize the Postmaster General to bring administrative and judicial proceedings in order to intercept mailings designed to promote fraudulent schemes. See *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Lynch* v. *Blount*, 404 U.S. 1007 (1972), aff'g summarily 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court); *Outpost Dev. Corp.* v. *United States*, 414 U.S. 1105, aff'g summarily 369 F. Supp. 399 (C.D. Cal. 1973) (three-judge court); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904). The Court relied on *In re Rapier* in upholding those laws. *Public Clearing House* v. *Coyne*, 194 U.S. at 508 (relying on *Rapier*); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. at 190-191 (relying on *Coyne*). That principle has also been endorsed in subsequent decisions. See, *e.g.*, *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d 362, 366-368 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982) (upholding 39 U.S.C. 3005 and 3007 over a First Amendment challenge); *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y.

that even commercial speech truthfully promoting a lawful activity may in some cases be banned altogether not in spite of, but precisely because of, its content. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341 (1986) (gambling advertising); *Queensgate Inv. Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138, 142 (Ohio), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982) (alcohol advertising); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), aff'd summarily, 405 U.S. 1000 (1972) (broadcast cigarette advertising).

This Court's 1986 decision in *Posadas* is illustrative. In that case, the Court upheld regulations prohibiting the commercial advertising of casino gambling to the residents of Puerto Rico, even though casino gambling and other forms of gambling were legal in that jurisdiction. The Court ruled that Puerto Rico has a legitimate interest in restricting the commercial advertising of casino gambling in order to safeguard society's moral well-being, and to prevent the corruption and infiltration of organized crime that, unfortunately, often shadows organized gambling. 478 U.S. at 341. Moreover, the Court ruled that restricting commercial advertising is a rational way to advance those interests, since the government could reasonably believe that the commercial advertising of casino gambling would enhance the demand for that activity. *Id.* at 341-342. The restriction was

1978), aff'd mem., 603 F.2d 214 (2d Cir.), cert. denied, 444 U.S. 915 (1979) (§ 3005); *Hollywood House Int'l, Inc.* v. *Klassen*, 508 F.2d 1276 (9th Cir. 1974) (§ 3005); *United States Postal Service* v. *Beamish*, 466 F.2d 804, 806-807 (3d Cir. 1972) (§ 3007).

also reasonably tailored to Puerto Rico's interest in safeguarding the welfare of its citizens, because it was focused on residents. *Id.* at 343-344. Finally, the Court held that since Puerto Rico could outlaw gambling altogether, it could take the less restrictive step of banning the commercial advertising of that activity. *Id.* at 345-347. As the Court later summarized: "In *Posadas* the Court concluded that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'" *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988) (quoting *Posadas*, 478 U.S. at 345-346).

Posadas is controlling here as well. Sections 1304 and 1307, like the gambling advertising restriction in *Posadas*, regulate expression promoting an activity that Congress and the States may prohibit altogether. Government historically has had the authority under the police power to outlaw gambling to protect the public against the harms traditionally associated with that activity. *Posadas*, 478 U.S. at 345; *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-357; *Otis* v. *Parker*, 187 U.S. 606, 609 (1903). Opponents of gambling have long argued that it contributes to corruption and the growth of organized crime; that it underwrites bribery, narcotics trafficking, and other crimes; that it imposes a regressive tax on the poor, the persons who are least able to bear that burden; and that it offers a false but sometimes irresistible hope of financial advancement.[15] The belief that

[15] See, *e.g.*, the Congressional Statement of Findings and Purpose Preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; President Nixon's Message on Organized Crime, H.R. Doc.

gambling is harmful is therefore rational. In fact, the Court expressly so held in *Posadas*. 478 U.S. at 341.

The States may also treat lotteries in the same manner as any other form of gambling. At one time, this Court expressed the view that lotteries are beset with "inherent vices," and that it "cannot admit of a doubt" that they are "demoralizing in their effects, no matter how carefully regulated." *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880). During the last century it was accepted wisdom that "the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850); see *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 355-356. More recently, it has been noted that "[p]eriodically every form of commercial gambling has been infected by corruption, attesting to the unique attraction between organized crime groups and gambling's financial promise. Horse racing, casino operations, professional sports, state run lotteries—legal gambling of all kinds has been infiltrated in some form, at some time or other, by organized crime." 7 President's Comm'n on Organized Crime, *Hearing on Organized Crime and Gambling* vi (1985).

No. 105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 71 (1969); S. Rep. No. 1579, 51st Cong., 1st Sess. 1, 4 (1890); *Brown* v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 494-495 (1984); *Phalen* v. *Virginia*, 49 U.S. (8 How.) at 168; President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Comm'n on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); *Gambling* 74-88, 678-734; G. Sullivan, *supra*, at 45-49, 120-128.

The government's interests at stake here are the same ones that persuaded that Court in *Ex parte Jackson* and *In re Rapier* to uphold the provisions in the Postal Code that served as the predecessors to 18 U.S.C. 1304. This Court reasoned that Congress has the authority under the Postal Clause of the Constitution, Art. I, § 8, Cl. 7, to prohibit the use of the mails to promote lotteries, since participating in a lottery is not a fundamental right and since Congress had not barred newspapers from distributing lottery-related materials by means other than the mails. In so ruling, the Court recognized that Congress could support the States' effort to safeguard the public against the harmful effects of gambling by excluding lottery-related promotional materials from the mails. *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737.

That rationale is still valid today. Participating in a lottery, like any other form of gambling, is not a constitutionally protected activity. The federal government and the States may regulate gambling, or prohibit it altogether. *Posadas*, 478 U.S. at 345.[16] Even today, most States still prohibit most forms of

[16] Accord, *e.g.*, *Lewis* v. *United States*, 348 U.S. 419, 422-423 (1955), overruled in part on other grounds, *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358; *Ah Sin* v. *Wittman*, 198 U.S. 500, 505-507 (1905); *Otis* v. *Parker*, 187 U.S. 606, 609 (1903).

privately-run organized gambling, such as casinos, and regulate other forms of gambling, including bingo. It is doubtless true that lotteries are no longer held in the same disrepute they enjoyed when this Court decided *Ex parte Jackson* and *In re Rapier*. Attitudes change over time, sometime cyclicly, as new demons replace old ones. Indeed, with respect to lotteries, our attitudes may have returned to the same phase of the cycle that existed in the colonial period, when lotteries were considered an acceptable activity, or "were thought pardonable at least." *Otis* v. *Parker*, 187 U.S. 606, 609 (1903). Forty-five States now permit some form of gaming, such as bingo. S. Rep. No. 446, 100th Cong., 2d Sess. 11-12 (1988). Many run state lotteries, or permit private ones. States have adopted state-run lotteries as an alternative to raising taxes and see them as a means of tapping into money that otherwise might be taken in by organized crime; private enterprises use lotteries as a means of attracting customers; and charitable organizations use lotteries as fundraising devices. H.R. Rep. No. 557, 100th Cong., 2d Sess. Pt. 1, at 4 (1988). But the debate over the wisdom or morality of lotteries has always been undertaken in the legislatures, not in the courts. There it should remain.

b. History also clearly reveals that society has long prohibited or greatly limited the advertising that can be used to promote activities deemed harmful, such as gambling, as a means of limiting consumer demand for and the growth of such undertakings. Gambling may be outlawed entirely. As a matter of policy, the experience with Prohibition, however, suggests that a flat ban on certain activities, such as the consumption of alcohol, can prove more harmful than a system of regulation allowing that

activity to be conducted under strict oversight and control. Governments thus compromise: They permit some forms of gambling to operate, but limit their operation. A common limitation is to restrict or forbid advertising, because advertising spurs demand. As Professor Richard Epstein has summarized, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65 (1988):

> One reason to legalize gambling is simply damage control. It is better that people not gamble, not only for their own personal character, but also for the corrosive effect gambling has on family and business obligations. Nonetheless, it is just too costly to try to control gambling by criminal sanctions. Better therefore to legalize the "disfavored" activity, which can then be taxed to keep participation within reason. Disfavored activities, moreover, need not be treated like all other business activities. Advertisement stimulates business, so it might be proper for a state to decide that, while it should not ban gambling, it should nonetheless moderate its growth by banning advertising.

The broadcast lottery regulatory scheme, which was patterned after the similarly structured Postal Code, parallels the one upheld in *Posadas*. Just as the Puerto Rico legislature has general police power, Congress has the authority under the Commerce Clause, Art. I, § 8, Cl. 3, to ban the distribution in interstate or foreign commerce of lottery materials, such as tickets, *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358, or to regulate local forms of gambling that affect interstate commerce, *United States* v. *Hawes*, 529 F.2d 472, 477-478 (5th Cir. 1976) (col-

lecting cases); *United States* v. *Hunter*, 478 F.2d 1019, 1021 (7th Cir.) (Stevens, J.), cert. denied, 414 U.S. 857 (1973) (upholding over Commerce Clause challenge 18 U.S.C. 1955, which makes it a crime to conduct a gambling business in violation of state law). See generally *Perez* v. *United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Congress therefore could have outlawed all lotteries, privately- or state-run, that are in or affect interstate commerce. Instead, Congress chose to restrict their ability to use the mail and to broadcast advertisements over the airwaves. This Court upheld such a judgment long ago in *Ex parte Jackson* and *In re Rapier*. *Posadas* shows that Congress's judgment is a permissible one today. As the Court explained in *Posadas*: "It would * * * surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." 478 U.S. at 346. The Constitution does not put Congress to the choice between a total ban on an activity or unlimited advertising of it. *Posadas* shows that Congress has a third choice—*viz.*, restricting the advertising of that activity. "To rule out the latter, intermediate kind of response would require more than we find in the First Amendment." *Posadas*, 478 U.S. at 347. In sum, *Posadas* reveals that the Court's decisions in *Ex parte Jackson* and *In re Rapier* have not been eclipsed by the modern development of the commercial speech doctrine.

c. To be sure, Congress has not completely prohibited all broadcast lottery advertising. Congress has created an exception for broadcasters operating in states with state-run lotteries. 18 U.S.C. 1307. But that exception is not inconsistent with the overall regulatory scheme. Congress could rationally believe that state-run lotteries are less likely to become large-scale gambling syndicates—latter-day versions of the Louisiana Lottery—because of state oversight and control. See G. Sullivan, *By Chance a Winner: The History of Lotteries* 122-123 (1972). At the same time, the exception accommodates the interests of the States, like Virginia, that operate lotteries themselves. S. Rep. No. 1404, *supra*, at 2; H.R. Rep. No. 1517, *supra*, at 5. That exercise in federalism is a legitimate undertaking for Congress. Cf. *South Carolina* v. *Baker*, 485 U.S. 505, 512-513 (1988). Congress's regulatory scheme cannot be challenged on the ground that it is impermissibly under[illegible]sive, since 18 U.S.C. 1307 classifies on the basi[illegible] legality of lotteries in the broadcaster's state, n[illegible]e basis of the content of speech; the race, sex, religion, or political affiliation of the speaker; or some other, irrational factor. See *R.A.V.* v. *St. Paul*, 112 S. Ct. 2538, 2543, 2546-2547 (1992); *id.* at 2555 (opinion of White, J.). In sum, the limited advertising restriction in Section 1307 does not undercut the legitimacy of Congress's efforts.[17]

[17] Even if the Court were to replace the *Central Hudson* test with stronger protection for commercial speech, the decision in *Posadas* should remain good law. Society has traditionally forbidden advertising of activities normally considered a "vice," such as gambling or consuming alcohol. Such activities could reasonably be deemed to constitute a class by themselves.

II. THE ADVERTISING RESTRICTIONS SATISFY THE *CENTRAL HUDSON* TEST TO MEASURE THE VALIDITY OF GOVERNMENT REGULATION OF COMMERCIAL SPEECH

Regardless of whether the Court believes that the advertising of gambling should be treated the same as advertising of noninjurious activities, the judgment below should be reversed because the courts below misapplied the *Central Hudson* test. Under that test, the government may restrict lawful commercial speech if the government's interest is substantial, if the restriction directly advances that interest, and if the restriction is narrowly tailored to serve that interest. *Fox*, 492 U.S. at 475-481; *Central Hudson*, 447 U.S. at 566. In ruling that 18 U.S.C. 1304 and 1307 could not constitutionally be applied to respondent, the courts below repudiated the geographic bright-line rule that Congress deliberately selected in order to balance the divergent interests of anti- and pro-lottery States. Their repudiation of the line purposefully drawn by Congress rests on several basic errors of First Amendment analysis; it ignores the Court's most recent and directly analogous commercial speech precedent, *Posadas*; and it compromises the integrity and workability of a regulatory scheme that Congress revisited and decided to maintain only four years ago.

A. The Advertising Restrictions Advance Several Legitimate Governmental Interests

The first step in the *Central Hudson* inquiry relevant here is whether the government has a substantial interest in restricting the speech at issue. *Posadas*, 478 U.S. at 340-341; *Central Hudson*, 447 U.S. at 566. Sections

1304 and 1307 advance several substantial governmental interests. First, by prohibiting the commercial promotion of private lotteries, they further the policies of States that have forbidden gambling within their borders. Second, by restricting the interstate growth of private lotteries, Section 1304 helps to reduce the threat of organized criminal infiltration of gambling enterprises and makes it easier for the States that allow private lotteries to police that activity. Third, by allowing state-run lotteries to be advertised, Congress has also allowed the States to maintain a local monopoly over lottery activity in order to raise state revenues. In sum, for the reasons stated in Point I, those interests clearly are "substantial" under *Central Hudson*.

B. The Advertising Restrictions Are Narrowly Tailored To Advance The Government's Legitimate Interests

The last prong of the *Central Hudson* test asks whether the government's restriction is narrowly tailored to advance the government's legitimate interests. *Fox*, 492 U.S. at 480; see *Central Hudson*, 447 U.S. at 566. This Court discussed in detail the nature of this inquiry in *Fox*. 492 U.S. at 475-481.

Fox explained that the *Central Hudson* test does not require that commercial speech restrictions satisfy the "least restrictive means" test used in other areas of constitutional law. 492 U.S. at 476-477. Drawing an analogy to the Court's cases dealing with so-called "time, place, and manner" restrictions on speech—cases in which the Court had expressly rejected use of a "least restrictive means" test to gauge the legality or restrictions on speech, see, *e.g.*, *Ward* v. *Rock*

Against Racism, 491 U.S. 781, 798-799 (1989); *United States* v. *Albertini*, 472 U.S. 675, 687-689 (1985); *Regan* v. *Time, Inc.*, 468 U.S. 641, 657 (1984) (plurality opinion); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984)—the Court in *Fox* concluded that "it would be incompatible with the asserted subordinate position [of commercial speech] in the scale of First Amendment values to apply a more rigid standard" to such speech. 492 U.S. at 478 (internal quotation marks omitted). At the same time, because commercial speech is a form of speech and is entitled to greater protection than purely commercial undertakings, the Court said that it would "require the government goal to be substantial, and the cost to be carefully calculated." *Id.* at 480. As the Court summarized, what the First Amendment requires is "a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but * * * a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Ibid.* (citations and internal quotation marks omitted).

Both courts below correctly held that Sections 1304 and 1307 satisfy that standard. Pet. App. 7a, 27a-28a. Those statutes seek to accommodate divergent interests. Under Section 1307, Congress freed broadcasters to promote lotteries if the station is licensed to a State that runs a lottery, while restricting the commercial promotion of lotteries by broadcasters who are

licensed to States that outlaw them. That bright-line rule, resting on the geographic boundaries of the different States, reasonably attempts to satisfy the interests of each category of States without trammelling the interests of either one. Indeed, as the district court explained, "[s]hort of leaving regulation to the states, it is difficult to envision a more narrowly-tailored set of provisions than those set forth in sections 1304 and 1307." Pet. App. 28a. Perhaps the best proof of that fact is that respondent did not even challenge in the court of appeals the district court's ruling in this regard. *Id.* at 7a.

C. The Advertising Restrictions Directly Advance The Government's Legitimate Interests

The courts below concluded that Sections 1304 and 1307 cannot constitutionally be applied to respondent because those laws do not "directly advance" the government's interests and thus do not meet the third prong of the *Central Hudson* test. The courts' reasoning, however, is flawed in several independently fatal respects.

1. *The advertising restrictions accommodate the divergent interests of the States toward state-run lotteries*

The court of appeals' majority's first error was its failure to recognize that Sections 1304 and 1307 are designed to serve not one interest, but two: discouraging lottery participation in the States that do not sponsor lotteries *and* accommodating lottery participation and promotion in the States that do. H.R. Rep. No. 1517, *supra*, at 5; S. Rep. No. 1404, *supra*, at 2. The simultaneous pursuit of these two interests reflects a single unifying purpose with deep roots in

federalism and history: namely, assisting the States in their pursuit of independent social and economic policies regarding gambling.

Under *Central Hudson*, the question is whether Sections 1304 and 1307 "directly advance" the two interests being simultaneously pursued by Congress. The answer to that question is clearly yes. On their face, Sections 1304 and 1307 directly advance both interests by allowing broadcast lottery advertising in lottery States while prohibiting it in non-lottery States. See S. Rep. No. 1404, *supra*, at 3 ("the accommodation afforded by [Section 1307] meets the essential needs of lottery States without unnecessarily encroaching on non-lottery States"). And even as applied in this case, Sections 1304 and 1307 satisfy the direct advancement test, since they allow lottery advertising by Virginia's stations while preventing lottery advertising by a North Carolina station that reaches more than 100,000 North Carolina residents.

This Court has made clear that a legislature is free to restrict one source of commercial speech while allowing another, as Congress has done here, as long as it is reasonably attempting to reconcile competing interests. In *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), the Court rejected a First Amendment challenge to a San Diego ordinance that, for safety and esthetic reasons, banned *offsite* billboard advertising but permitted *onsite* billboard advertising and other specified commercial signs. In upholding the ordinance, the Court deferred to San Diego's policy judgment about the balance to be struck "between the city's land-use interests and the commercial interests of those seeking to purvey goods and services," 453 U.S. at 512 (plurality opinion); *id.* at 541 (opinion

of Stevens, J., concurring in part and dissenting in part). The Court held that San Diego could resolve this balance in favor of restricting one source of advertising (offsite billboards) but against restricting another source (onsite billboards) without running afoul of *Central Hudson*'s direct advancement test. By the same token, Congress should be free to balance the competing interests of non-lottery and lottery States by restricting advertising from one source (stations licensed to locations in non-lottery States) while allowing lottery advertising from another source (stations licensed to locations in lottery States). The fact that the results are imperfect in some circumstances does not mean that Sections 1304 and 1307 fail to "directly advance" the balance sought by Congress.

2. The reasonableness of the advertising restrictions must be evaluated on a national, not a station-by-station, basis

The courts below not only failed to consider both interests advanced by Sections 1304 and 1307, but also failed to measure the reasonableness of the " 'fit' between [Congress's] ends and the means chosen to accomplish those ends," *Posadas*, 478 U.S. at 341, at the appropriate level of generality. Relying upon the effect that those statutes have on respondent, the courts held that Sections 1304 and 1307 do not directly advance Congress's interests *as applied to respondent's station, WMYK*. Pet. App. 6a-7a, 23a-27a. But that type of analysis would require courts to undertake a station-by-station evaluation of the reasonableness of Congress's scheme as applied to every broadcaster in the nation. This Court has demanded

that kind of exact "fit" only when strict scrutiny is appropriate, as in the case of political speech, and has never required such precision in the context of commercial speech.

Metromedia and *Posadas* illustrate that point. This Court did not suggest in *Metromedia* that a store-owner could challenge the billboard ordinance on the ground that, since the vicinity of the business was already greatly cluttered with other forms of visual blights (such as garish storefronts), permitting that business to use a billboard to advertise would not marginally injure San Diego's interests in traffic safety and esthetics. 453 U.S. at 508-512 (plurality opinion); *id.* at 541 (opinion of Stevens, J., concurring in part and dissenting in part). Likewise, the Court in *Posadas* did not suggest that each individual casino owner would be free to claim that the law was unconstitutional as applied to him, because the public knew that he ran a casino. 478 U.S. at 341-343. Instead, in each case the Court explained that the relevant inquiry was whether the legislature's judgment was reasonable as a general matter, not whether it was reasonable as applied to every affected party. By requiring Congress to shoulder such a heavy burden, the courts below misunderstood the teaching of *Metromedia* and *Posadas*.

There is also no reason to force Congress to adopt a foolproof advertising regulatory scheme. In *Fox*, the Court rejected a "least restrictive means" approach to the last prong of the *Central Hudson* test, 492 U.S. at 478-480, and the Court's reasons for refusing to adopt such a strict form of judicial scrutiny apply here too. The "field" of commercial speech has traditionally been subject to governmental regulation, *id.* at 481, especially when speech concerns what has long been deemed a "vice," such as gambling, and here too it is difficult for legislatures to know just how much regulation is necessary to restrict the public's demand for such an activity, *id.* at 480-481. Legislatures need more leeway than would be justified when political speech is at issue and must be free to experiment with a variety of regulatory measures in order to limit consumer demand to whatever level is deemed appropriate. That goal is attainable only if legislatures can make across-the-board judgments for the benefit of society as a whole, even if that judgment proves ineffectual or irrational when applied to a specific individual. Congress should not therefore be saddled with the burden of justifying advertising restrictions when applied to every broadcaster.

As stated above, *Posadas* explained that this prong of the *Central Hudson* test measures the "fit" between the means and ends that Congress has chosen. 478 U.S. at 341. It therefore may be valuable to draw an analogy to equal protection principles, where the same type of "means-ends" scrutiny is performed. This Court's decision in *Vance* v. *Bradley*, 440 U.S. 93 (1979), is instructive in that regard. The Court there upheld as rational a statute requiring Foreign Service personnel to retire at age 60. The Court recognized that there could be disagreement over the question whether a 60-year-old was less capable of performing as a Foreign Service officer than someone a decade younger, *id.* at 111-112, but nonetheless held that Congress has the power to resolve factual disputes, and that Congress's determination could not be challenged unless it "ha[d] no reasonable basis for believing" that 60 years was an appropriate retirement

age, *id.* at 111. In so ruling, the Court did not suggest that a 60-year-old Foreign Service officer could challenge the statute on the ground that he could prove that he was as fit as someone who was ten years junior to him. That result would require a type of perfect fit between the statutory means and ends that this Court in *Vance* eschewed. *Id.* at 108 ("in a case like this 'perfection is by no means required' "). Although the *Central Hudson* test is more exacting than the "rational basis" test that is used under equal protection analysis, *Fox*, 492 U.S. at 480, it is not a form of strict scrutiny, see *id.* at 476-481, and therefore does not demand the perfection that respondent supposes. For that reason, just as a particular Foreign Service officer could not claim that the mandatory retirement age was irrational in his case, so, too, respondent should not be heard to complain that the line drawn by 18 U.S.C. 1304 and 1307 imposes an arbitrary restraint in his particular case.

To be sure, the effects that an advertising restriction have on a particular broadcaster are relevant. They may suggest that the restriction was designed to serve an illegitimate purpose, or that Congress cannot hope to accomplish its stated goals with its chosen means even when viewed at a national level, if the effect on one broadcaster is the same as the effect on them all. But that is not how the courts below measured the effects of Sections 1304 and 1307 on respondent's radio station. The courts below believed that the statutes were unconstitutional if they prevented WMYK from selling advertising time promoting the Virginia Lottery without also making some contribution to Congress's goals. Yet, unless a statute must make progress toward its goals in the case of each regulated party—a requirement that the

Court has never imposed in the commercial speech area—the fact that a statute sometimes proves ineffectual does not render it unconstitutional.

3. *The advertising restrictions are not invalid because they are "underinclusive"*

a. The majority limited its attention to only one of the interests served by Sections 1304 and 1307, that of protecting non-lottery States. As shown above, the failure to take account of *both* interests underlying those statutes was error. But even if it were proper to look only to Congress's interest in supporting the policies of non-lottery States, Sections 1304 and 1307 would still pass muster under *Central Hudson*.

In reaching a contrary conclusion, the majority relied on the fact that WMYK's North Carolina audience already receives a substantial volume of Virginia lottery advertising from Virginia media. Pet. App. 6a-7a. In essence, the majority held that, as applied in this case, Sections 1304 and 1307 are fatally underinclusive: that is, too much commercial speech about the Virginia Lottery has been left unrestrained for Sections 1304 and 1307 to "directly advance" Congress's goal in this case.

That underinclusiveness theory is misconceived, since mere underinclusiveness—*viz.*, the failure to restrain other types of commercial speech that convey similar information and pose similar risks—is not fatal under the direct advancement test of *Central Hudson*. Because the electromagnetic waves of radio and television broadcasts cross state lines, as Judge Widener noted in his dissent below, Pet. App. 9a, the contrary interests of lottery and non-lottery States regarding broadcast lottery advertising cannot be ac-

commodated perfectly. Cf. S. Rep. No. 1404, *supra*, at 3 (Section 1307 shaped by recognition that "broadcast transmission cannot be halted at an arbitrary boundary"). But the First Amendment does not demand perfection when commercial speech is involved. In particular, this Court has made clear that a legislature is free to restrict one source of commercial speech while allowing another, as Congress has done here, as long as it is reasonably attempting to reconcile competing interests.

The Court's decision in *Metromedia* is again illustrative. In *Metromedia*, San Diego's billboard ordinance was attacked as impermissibly underinclusive because of its failure to ban onsite as well as offsite advertising. This Court squarely rejected that argument: "[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." 453 U.S. at 511 (plurality opinion); *id.* at 541 (opinion of Stevens, J., concurring in part and dissenting in part).

Relying on *Metromedia*, this Court again rejected a similar underinclusiveness argument in *Posadas*. The restrictions on casino gambling advertising were challenged in *Posadas* on the ground that other forms of gambling, such as horse racing, cockfighting, and the Puerto Rico lottery, could be advertised to the residents of the island. The Court squarely ruled that "whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." 478 U.S. at 342. The Court also concluded that the

legislature had targeted its ban at casino gambling, because it believed that "the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico," *id.* at 343, and that the narrowly-focused advertising restrictions at issue would, in the legislature's view, thereby "reduce demand for casino gambling," *id.* at 342. *Posadas*, like *Metromedia*, therefore rejected an underinclusiveness claim that does not differ in any material respect from the one endorsed by the courts below.

Indeed, the court of appeals made no effort to come to grips with *Posadas*.[18] Yet *Posadas* strikes at the heart of its rationale. As we explained in Point I, if the "greater power" to ban gambling necessarily includes the "lesser power" to ban gambling advertising, then respondent's claimed First Amendment right to broadcast lottery advertising wholly lacks merit. But even if *Posadas* does not render per se lawful ordinary restraints on the advertising of gambling like the ones in Sections 1304 and 1307, *Posadas* certainly offers strong support for the constitutionality of those laws under *Central Hudson*, both facially and as applied in this case. After all, there is no reason to believe that the restriction on casino gambling advertising in *Posadas*, which exposed the local residents to gambling advertising as long as it was not "aimed" at them, was any more effective, to paraphrase the court of appeals, at "shielding [Puerto Rico's] residents from [gambling] information," Pet. App. 7a, than Congress's geographic restriction on lottery advertising here. *Posadas* shows

---

[18] Though discussed extensively by the district court and the parties on appeal, *Posadas* is not even cited by the court of appeals, much less distinguished.

that an added measure of judicial deference is due when a legislature makes a judgment about the effect of advertising restrictions on activities such as gambling. No such deference can be found in the majority's opinion in this case.

b. Aside from being inconsistent with this Court's cases, the court of appeals' underinclusiveness rationale is misguided because *Central Hudson*'s direct advancement standard is not primarily an empirical test, with courts gauging the efficacy of a statutory restraint and invalidating it whenever they deem it to be ineffective.[19] Such an approach would involve the judiciary in a quintessential legislative task. The direct advancement standard asks a different, more qualitative question: whether there is a logical or common sense link, not an indirect or speculative one, between the restraint imposed by Congress and the policies sought to be advanced. That is how this Court has described the test. See *Posadas*, 478 U.S. at 342 (the direct advancement step is met when the legislative judgment is "a reasonable one"); *Metromedia*, 453 U.S. at 508-509 (plurality opinion) (the direct advancement step is met when the legislative judgment "is not manifestly unreasonable"; accepting "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that bill-

[19] This Court arguably undertook such an inquiry in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where the Court struck down a law prohibiting the mailing of unsolicited advertisements for contraceptives. Such heightened scrutiny was warranted in *Youngs Drug Products*, however, only because "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected." *Posadas*, 478 U.S. at 345. Here, by contrast, the underlying conduct (gambling) is not constitutionally protected, and could be prohibited altogether. *Ibid.*

boards are real and substantial hazards to traffic safety"); cf. *Fox*, 492 U.S. at 480-481. As long as such a link exists between the restraint imposed and the interests pursued, underinclusiveness does not disable a statute and prevent it from "directly advancing" those interests. Whether the restriction is "worth it" is a judgment for the legislature.

It can hardly be gainsaid that there is a direct connection between restrictions on lottery advertising and lottery participation. This Court held in *Posadas* that a legislature may reasonably conclude that restricting the advertising of gambling will reduce the consumer demand for that activity, and will thereby further the government's interest in protecting the public from the harms associated with gambling. 478 U.S. at 341-343. That ruling is consistent with other decisions by this Court and the lower federal and state courts holding that a legislature reasonably may believe that a restriction on the advertising of alcoholic beverages will reduce alcohol consumption and the injuries that drinking can cause.[20] That conclusion also makes economic sense. Banning adver-

[20] See *Queensgate Inv. Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138, 142 (Ohio), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 749-750 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 501 (10th Cir. 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729, 734-735 (R.I. 1985); *Rhode Island Liquor Stores Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331, 335-337 (R.I. 1985); cf. *Republic Entertainment, Inc.* v. *Clark County Liquor & Gaming Licensing Bd.*, 672 P.2d 634 (Nev. 1983); *Princess Sea Indus., Inc.* v. *Nevada*, 635 P.2d 281 (Nev. 1981), cert. denied, 456 U.S. 926 (1982).

tising of a product makes it costly for consumers to learn about and purchase that good. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-765 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 25-28 (1979). Advertising restrictions therefore are a sensible way to reduce consumer demand for a product.

c. Respondent argues that Sections 1304 and 1307 serve the interests of neither Virginia nor North Carolina when applied to respondent. According to respondent, its Virginia audience is denied advertising about that State's lottery, while its North Carolina audience is exposed to Virginia lottery advertising from a variety of other sources. Br. in Opp. 8-10. Respondent contends that, as applied, Sections 1304 and 1307 have on effect whatever on the exposure of North Carolina residents Virginia lottery advertising, that Sections 1304 and 1307 "accomplish[] nothing," are "wholly ineffective" and "advance[] no governmental interest whatsoever," and that those statutes necessarily fail *Central Hudson*'s direct advancement test. Br. in Opp. 7, 10, 11. There are several flaws in that argument.

First, the record does not support respondent's repeated assertions that Sections 1304 and 1307 "accomplish nothing" as applied to respondent. The district court itself acknowledged that, as applied to respondent, Sections 1304 and 1307 probably *do* reduce the exposure of North Carolina residents to Virginia lottery advertising, albeit only to a limited extent. See Pet. App. 23a. In the district court's words, "[i]t is probably true that a relatively small number of North Carolina listeners who listen only

or mainly to Power 94 may hear significantly less lottery advertising" because of Sections 1304 and 1307, and that "other North Carolinians may hear slightly less lottery advertising because they occasionally listen to Power 94." Pet. App. 23a. Thus, contrary to respondent's suggestion, Br. in Opp. i, this case does not present the question whether the First Amendment is violated by "a ban on commercial speech that is wholly ineffective * * * when applied to a particular speaker." The district court concluded that Sections 1304 and 1307 are not "wholly ineffective," even as applied to respondent.

Second, in applying *Central Hudson*'s direct advancement test, respondent considers one of the two interests served by Sections 1304 and 1307—the interest in furthering North Carolina's anti-lottery policy—and altogether ignores the other interest—the interest in accommodating Virginia's state lottery. The statutes seek to advance both policies simultaneously in order to vindicate Congress's underlying goal of advancing federalism. In these circumstances, it is inevitable that these statutes will not insulate respondent's North Carolina audience from Virginia lottery advertising as well as would a single-minded, flat ban on all lottery advertising. But that hardly means that Sections 1304 and 1307 fail to "directly advance" Congress's interests in this setting. The limited impact of the laws on North Carolina residents in this case is inherent in Congress's accommodation of the divergent state lottery policies. To hold this attempt unconstitutional would be to hold that one of the legitimate interests furthered by Sections 1304 and 1307 must be sacrificed to serve the other. Nothing in *Central Hudson* or its

progeny requires any such result, and respondent cites no authority to support such a claim.

In fact, the Court rejected a similar argument in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). New York City had adopted a noise ordinance requiring concert performers at a city park to use sound amplification equipment and a sound technician provided by the city. There, as in this case, the city offered divergent justifications for its rule: the interest in limiting sound volume for nearby residents, and the interest in ensuring that the sound volume was adequate for concert listeners. The Court held that "[i]t is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances." 491 U.S. at 800. The Court also held that the city's interest in ensuring that sound volume was adequate supported the city's regulation, even if the regulation were unnecessary in the case of the plaintiff's concerts, "which apparently were characterized by more-than-adequate sound amplification," *id.* at 801. As the Court explained, *ibid.*:

> [T]hat fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it.

The Court concluded that "[c]onsidering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline." *Ibid.*

The Court's decision in *Ward* v. *Rock Against Racism* undermines respondent's argument. Although *Ward* involved a "time, place, and manner restriction" on expression, the Court made clear in *Fox*, 492 U.S. at 47, that "application of the *Central Hudson* test was 'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech." The Court's ruling in *Ward* that "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case," 491 U.S. at 801, therefore applies here too. And when Sections 1304 and 1307 are so analyzed, they clearly satisfy the *Central Hudson* test.

d. The Fourth Circuit's underinclusiveness approach is ironic because it effectively condemns Congress under the First Amendment for *relaxing* restrictions on lottery advertising. Before 1975, when Congress passed Section 1307, federal law imposed an absolute ban on broadcast lottery advertising. Pp. 6-8, *supra*. If Congress had never enacted Section 1307, leaving undisturbed the unqualified ban on lottery advertising in Section 1304, it could not seriously be argued that Section 1304 failed to "directly advance" Congress's interest in protecting the policies of non-lottery States. It is only because Congress *relaxed* the once-absolute prohibition on lottery advertising that

the courts below could condemn under *Central Hudson* the one remaining restriction in the broadcast regulatory scheme. The court of appeals' decision therefore has the perverse effect of condemning Sections 1304 and 1307 precisely because those laws permit *more* speech to be broadcast than would be the case if Section 1307 never had been enacted at all. Nothing in *Central Hudson* requires such a perverse result.[21]

Respondent finds such a result is defensible, on the theory that a comprehensive ban affects all broadcasters equally, while the partial lifting of broadcast restrictions brought about by Section 1307 "creates favored and disfavored speakers." Br. in Opp. 15-16.[22] But respondent's argument assumes that Sec-

[21] Indeed, if WMYK's listeners are as "inundated with Virginia's lottery advertisements" as the court of appeals believed, Pet. App. 6a-7a, the ruling below is double ironic. After all, the speech at issue here is not speech that expresses a political, scientific, or artistic opinion, but is merely speech that proposes a commercial transaction. See *Fox*, 492 U.S. at 473-474; *Posadas*, 478 U.S. at 340; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. Under the facts discussed by the courts below, there is little (if any) injury to the First Amendment interests of WMYK's audience, and no injury to respondent's ability to engage in discourse. The only injury is to respondent's ability to turn a profit by selling air time for lottery advertisements.

[22] Respondent even suggests that the geographic distinctions drawn by Sections 1304 and 1307 offend not only the First Amendment, but equal protection principles as well. Br. in Opp. 15 n.14. Equal protection principles, however, add nothing to the protections afforded by the First Amendment under *Central Hudson*. If the "fit" between statutory means and ends passes muster under *Central Hudson*, the demands of equal protection are necessarily satisfied as well. This Court made that point expressly in *Posadas*. 478 U.S. at 344 n.9; cf. *Fox*, 492 U.S. at 480.

tions 1304 and 1307, as applied here, serve only to "silence one voice among many" without advancing any governmental interest. Br. in Opp. 16. As explained above, it is both a factual and legal fallacy to claim that the laws do not advance the government's interests as applied in this case. Also, far from silencing "one voice among many," Sections 1304 and 1307 prohibit *all North Carolina licensees* from broadcasting lottery advertising. Respondent is not being singled out; instead, it is being subjected to a general geographic restriction that applies to all other broadcasters throughout the State. That restriction is an eminently sensible means of pursuing Congress's legitimate goals, and it is not unconstitutional merely because it is less effective in one instance than in others. See *Ward*, 491 U.S. at 801.

In any event, Sections 1304 and 1307 are not unconstitutional even if they do have the effect of favoring some broadcasters over others. There is no hint in Sections 1304 and 1307 of any intent to silence particular speakers because of their opinion about the desirability of lotteries. Rather, Congress has sought to protect the anti-gambling policies of non-lottery States without silencing broadcasters in States runing a state lottery. If those divergent interests are legitimate ones, and we submit that they are, then Congress *does* have the authority to silence some speakers (*e.g.*, broadcasters in North Carolina) in favor of others (*e.g.*, broadcasters in Virginia) in order to achieve those interests. Any discrimination in this regard is the inevitable consequence of allowing Congress to balance competing interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

RENEE LICHT
Acting General Counsel
Federal Communications Commission

SCOTT R. MCINTOSH
Attorney

JANUARY 1993

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part as follows:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 18 U.S.C. 1304 provides as follows:

Broadcasting lottery information

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

3. 18 U.S.C. 1307 provides as follows:

Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a

State acting under the authority of State law which is—

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60141

No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY, t/a POWER 94

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
Willcox & Savage, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500
Counsel for Respondent

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioners

PETITION FOR A WRIT OF CERTIORARI FILED
SEPTEMBER 17, 1992
CERTIORARI GRANTED DECEMBER 14, 1992

TABLE OF CONTENTS [1]

[1] The following items were printed in the petition appendix and are not reprinted herein: (1) the opinion of the court of appeals; (2) the order denying rehearing and rehearing en banc; (3) the opinion of the district court; and (4) the district court judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA
and FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1988		
Oct. 11	1	Complaint.
1989		
Feb. 5	8	Answer.
June 26	12	Motion to amend complaint on behalf of plaintiff. Brief received.
July 7	—	*Court proceedings* before Judge Frank Kaufman. Levy Brown (Tayloe), reptr. Counsel appeared. Matter came on for hearing on defendant's motion for summary judgment and plaintiff's motion to amend complaint. Arguments of counsel heard. Court's rulings stated into record. Plaintiff's motion to amend complaint GRANTED. Defendants' motion for summary judgment—DENIED. (By agreement

DATE	NR	PROCEEDINGS
		of counsel, all previous pleadings heretofore filed are applicable to amended complaint. All plaintiff's proffered exhibits listed at FPTC will be admitted if offered.) Court preparing memo and order pursuant to ruling. Counsel will meet with Court on July 14, 1989 at 9:00 A.M. re: stipulations.
July 7	15	Amended complaint.
July 14	—	*Court proceedings* before FAK, judge, no reptr. Counsel appeared. Matter came on for further hearing. Comments of Court and counsel heard. Stipulation filed in open court. Supplement to order on final pretrial conference filed in open Court Counsel for plaintiff may file affidavits by noon on July 21, 1989. Arguments set July 25, 1989 at 10:00 A.M.
July 14	18	Stipulation on behalf of parties, filed in open Court.
July 25	—	*Trial proceedings* before FAK, judge. Pamela Unverzart and Margaret Mann reptrs. Counsel appeared. Matter came on for trial by Court. Supplemental final pre-trial order filed in open Court. Evidence presented with introduction of exhibits, affidavits, pleadings and submissions. Arguments of counsel heard. Court takes matter under advisement. Transcript to be prepared. Government may file further submissions (briefs) by Aug. 18, 1989 and plaintiff may respond by Aug. 25, 1989, with original submissions to be sent to the Norfolk office and 2 copies of each to Judge Kaufman at Baltimore, Maryland. Court adjourned.
1990		
Feb. 28	26	Memorandum opinion, filed Feb. 26, 1990. FAK, Senior U.S. District Judge for District of Maryland. Copies mailed Feb. 28, 1990.

DATE	NR	PROCEEDINGS
1990		
Feb. 28	27	Judgment that plaintiff may operate Power 94 without being subject to the restrictions of 18 USC 1304 and 1307, and defendants are hereby enjoined from taking any action to the contrary, entered Feb. 23, 1990 and filed Feb. 26, 1990. FAK, judge. O.B. Copies mailed Feb. 28, 1990.
Apr. 20	28	Notice of appeal on behalf of defendants.
Apr. 24	—	Conformed copy of notice of appeal mailed by Clerk to Clerk, U.S. Court of Appeals (with transmittal sheet and copy of judgment and docket entries), and to Michael A. Rhine, Assistant U.S. Attorney and Margaret H. Plank, Esquire, (with notice, transcript purchase order and docketing statement), counsel for defendants, and to Conrad M. Shumadine, Esquire, Walter D. Kelley, Jr., Esquire, Cecelia Ann Wikenheiser, Esquire and Wayne G. Souza, Esquire, counsel for plaintiff.

By /s/ [Illegible]
Deputy Clerk

U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2668

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA; FEDERAL
COMMUNICATIONS COMMISSION,
DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
4/26/90	Civil case docketed. (kac)
10/31/90	Oral argument heard. Courtroom Deputy: sbb. [90-2668] (sbb)
2/27/92	Unpublished per curiam opinion filed. ([90-2668] (bc)
2/27/92	Judgment order filed. Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. HEW, Dissenting Judge; RFC; CHH1, Authoring Judge. [90-2668] (bc)
3/9/92	Motion filed by Appellant FCC, Appellant US to extend time to file petition for rehearing until: 4/13/92 [1623107-1] [90-2668] (bc)
3/9/92	Clerk order filed granting motion to extend time to file pet reh [1623107-1] until: 4/13/92 Copies to all counsel. [90-2668] (bc)

Date	PROCEEDINGS
4/13/92	Petition filed by Appellant FCC, Appellant US for rehearing. Number copies filed: 15 [1637567-1], for suggestion for rehearing in banc. Number of copies filed: 15 [1637567-2] [90-2668] (bc)
4/24/92	Answer [1643166-1] to motion for rehearing [1637567-1], motion for suggestion for reh in banc [1637567-2] filed by Appellee Edge Broadcasting. [90-2668] (bc)
5/20/92	COURT ORDER filed denying motion for rehearing [1637567-1], denying motion for suggestion for reh in banc [1637567-2] Copies to all counsel. [90-2668] (bc)
5/27/92	Mandate issued. [90-2668] (rm)
5/27/92	Record on appeal returned to USDC at EDVA-Norfolk. (Pleadings: Vols. 1-2 T/S: Vols. 3-5). [90-2668] (rm)
9/24/92	Supreme Court notice that petition for certiorari was filed on 09/17/92 Spct No. 92-486. [90-2668] (ldj)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA
and FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

AMENDED COMPLAINT

[Filed July 7, 1989]

Plaintiff, Edge Broadcasting Company, for its Amended Complaint against the defendants, the United States of America and the Federal Communications Commission, alleges as follows:

PARTIES

1. Edge Broadcasting Company ("Edge") is a stock corporation existing under and by virtue of the laws of the Commonwealth of Virginia. Edge maintains its principal place of business in Virginia Beach, Virginia, and owns the 100,000-watt radio station WMYK-FM, which trades under the name "POWER 94." WMYK is licensed by the Federal Communications Commission ("FCC") to Elizabeth City, North Carolina.

2. The United States of America is the federal governing body. The Executive Branch of the United States of America is charged with enforcing the criminal laws of the United States.

3. The FCC is a federal agency which was created by Congress via the Communications Act of 1934, 48 Stat. 1064, to license and regulate, *inter alia*, radio stations in the United States of America.

JURISDICTION AND VENUE

4. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 because this action arises under the United States Constitution.

5. An actual controversy exists between the parties, as more specifically set forth below, regarding the constitutionality of 18 U.S.C. §§ 1304 and 1307 and 47 C.F.R. § 73.1211. Accordingly, this case is a proper one for the exercise of this court's power to issue declaratory judgments pursuant to 28 U.S.C. § 2201(a).

6. Venue is properly laid in this judicial district and division pursuant to 28 U.S.C. § 1391(e) because the plaintiff resides in the Eastern District of Virginia.

FACTUAL BACKGROUND

7. On November 3, 1987, Virginia voters approved a referendum authorizing the Commonwealth to establish a lottery. Pursuant to enabling legislation, 58.1 Va. Code § 4000, *et seq.*, the Governor of Virginia thereafter appointed a Lottery Board to administer the State Lottery Department.

8. The creation of the Virginia lottery has been a boon to most radio stations in the Hampton Roads metro area as the Commonwealth has sought to promote its lottery and private enterprises have sought to capitalize on it.

9. Prior to the first sale of lottery tickets on September 20, 1988, the State Lottery Department purchased extensive promotional advertising from the Hampton Roads metro area radio stations. Private businesses also bought extensive advertising from radio stations, touting their establishments as outlets for the sale of lottery tickets.

Following the initial sale of lottery tickets, private businesses purchased further advertising, publicizing the winners whose fortunes were enhanced by patronizing their businesses and highlighting sales promotions which include lottery tickets as part of their appeal.

10. This surge in governmental and private advertising will continue in the future as the Virginia lottery continues and develops. The State Lottery Department projects that it will channel ten percent (10%) of the revenues created by the lottery into advertising and promotion, making the Commonwealth the single largest advertiser in Virginia. Furthermore, the creation, operation, and progress of the lottery has been the topic of numerous broadcasts by radio stations in Hampton Roads. The lottery will remain a source of newsworthy information for as long as it endures.

11. Twenty-four (24) commercial radio stations operate in the Hampton Roads metro area. All of these radio stations—except POWER 94 (and one low-power FM station)—have the lawful ability and right to broadcast advertising and information about the Virginia lottery. POWER 94 was and is prohibited by federal law from broadcasting any advertisements or information about the state-sponsored lottery.

12. Section 1304 of the United States Criminal Code, 18 U.S.C. § 1304, prohibits the broadcast of advertisements or information concerning lotteries. Any broadcaster who violates this section is subject to a fine of up to $1,000 and/or imprisonment up to one year.

13. The FCC has issued administrative regulations, 47 C.F.R. § 73.1211, which are identical in substance to the federal criminal statute outlined above. Any broadcaster who violates these regulations is subject to penalties ranging from a fine to license revocation.

14. An exception removes radio stations "licensed to a location" in Virginia from the prescriptions of § 1304 and the attendant federal regulations. Section 1307 of

the United States Criminal Code, 18 U.S.C. § 1307, permits radio stations licensed to a state with a state-sponsored lottery to broadcast advertisements and/or information about that lottery or the official lottery conducted in an adjacent state. Radio stations licensed to a state that does not have an official lottery are still prohibited from broadcasting any lottery advertisements or information whatsoever.

15. POWER 94 has its studios and corporate offices in Virginia Beach, Virginia. Approximately ninety percent (90%) of its listeners reside in Virginia. It derives more than ninety-five percent (95%) of its local advertising revenues from Virginia-based advertisers.

16. Even though its business is predominantly in Virginia, POWER 94 is licensed by the FCC to Elizabeth City, North Carolina. Because POWER 94 is "licensed to a location" in North Carolina and because North Carolina does not have a state-sponsored lottery, the statutes and regulations described above forbid POWER 94 from broadcasting the same information about the *Virginia* lottery that its competitors freely disseminate. POWER 94 is prohibited from broadcasting newsworthy information about the lottery, even though the same information is regularly carried into the area of North Carolina served by POWER 94 by its competitors and other Virginia television stations, newspapers, and periodicals.

17. The statutes and regulations outlined above do not directly advance any asserted governmental interest. The citizens of North Carolina residing within the area reached by POWER 94's signal are bombarded with Virginia lottery advertisements and information broadcast by the Virginia radio and television stations which service the area. These same North Carolinians are also inundated with Virginia lottery advertisements and information published by Virginia newspapers which serve the area of North Carolina reached by POWER 94's signal. Thus, despite the federal prohibitions, North Car-

olinians residing in the area served by POWER 94 are saturated with Virginia lottery information and advertising. No governmental interest whatsoever is furthered by forbidding POWER 94 from broadcasting information and advertising which already blankets the area via Virginia radio and television stations and newspapers.

18. POWER 94 is suffering and will continue to suffer substantially irreparable injury as a result of the governmental restraints placed upon its right to broadcast advertisements and/or information about the Virginia lottery. It has lost and is continuing to lose significant advertising revenue from both the Virginia Lottery Department and private advertisers. Because of the proscription against broadcasting any advertisements and/or information about the lottery, POWER 94 will sustain future losses, amounting to millions of dollars. POWER 94 is being forced to alter, at its own expense, standard advertisements to delete all references to the Virginia lottery. POWER 94 is also experiencing difficulties in determining what information, if any, it may lawfully broadcast about the Virginia lottery. Consequently, it broadcasts no Virginia lottery information, whatsoever. In addition, POWER 94's ratings are threatened because it is unable to provide the lottery information that the vast majority of its listeners wish to hear and its competitors provide. All of these effects are diminishing and will continue to diminish the value of the station and deprive its owner, Edge, of the value of its investment.

19. Edge has no adequate remedy at law.

CONSTITUTIONAL VIOLATIONS

20. The statutes and regulations outlined above, as applied to Edge, act as a prior restraint on Edge's right to free speech in violation of the First Amendment to the United States Constitution.

21. The statutes and regulations outlined above, as applied to Edge, violate Edge's right to free speech in

violation of the First Amendment to the United States Constitution.

22. The statutes and regulations outlined above are arbitrary, capricious, and discriminatory, as applied to Edge, and deprive Edge of its right to equal protection under the law in violation of the due process clause of the Fifth Amendment to the United States Constitution.

23. The statutes and regulations outlined above, as applied to Edge, are arbitrary, capricious, and discriminatory, bear no reasonable relation to a proper governmental objective, and deprive Edge of its right to substantive due process in violation of the due process clause of the Fifth Amendment to the United States Constitution.

24. The statutes and regulations outlined above and as applied to prohibit Edge from broadcasting Virginia lottery information and prize lists sweep within their ambit activities which are constitutionally protected and thus are overbroad, exerting a chilling effect on Edge's exercise of its right to free speech in violation of the First Amendment to the United States Constitution.

25. The statutes and regulations outlined above and as applied to Edge, which make the broadcasting of "any information" about the Virginia lottery a crime, are so vague and indefinite that they sweep within their broad scope activities that are constitutionally protected and require people of common intelligence to guess at their meaning and differ as to their application in violation of the due process clause of the Fifth Amendment to the United States Constitution.

RELIEF REQUESTED

WHEREFORE, Edge Broadcasting Company prays for the following relief:

(a) That this Court determine and declare that 18 U.S.C. §§ 1304 and 1307 and 47 C.F.R. § 73.1211, as ap-

plied to Edge, violate the Constitution of the United States of America;

(b) That this Court preliminarily and permanently enjoin defendants from enforcing 18 U.S.C. §§ 1304 and 1307 and 47 C.F.R. § 73.1211 against Edge; and

(c) That Edge be awarded the costs of this suit, together with such other and further relief as may be necessary and proper, or as the case may require.

EDGE BROADCASTING COMPANY,
t/a POWER 94

By /s/ Cecilia A. Wikenheiser
Of Counsel

Conrad M. Shumadine
Walter D. Kelley, Jr.
Cecilia Ann Wikenheiser
WILLCOX & SAVAGE, P.C.
1800 Sovran Center
Norfolk, VA 23510
(804) 628-5500

Wayne G. Souza
LYLE, SIEGEL, CROSHAW
& BEALE, P.C.
One Columbus Center
Virginia Beach, VA 23462
(804) 490-6000

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

ANSWER OF ALL DEFENDANTS

[Filed Feb. 15, 1989]

Defendants, by their undersigned attorneys, answer the complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of plaintiff's challenge to FCC regulations, as jurisdiction to review FCC orders is exclusive in the United States Courts of Appeal.

Third Defense

The complaint presents a facial challenge to the constitutionality of the restriction on commercial speech embodied in 18 U.S.C. §§ 1304 and 1307. Plaintiff's allegations that the statutory scheme unconstitutionally re-

stricts non-commercial speech, and plaintiff's request for a declaration that the statute may not constiutionally [*sic*] be applied to particular expressions, are not ripe for judicial review.

Fourth Defense

Defendants answer the numbered paragraphs of the complaint as follows:

1. Defendants admit the allegations contained in this paragraph.

2. Defendants admit the allegations contained in this paragraph.

3. Defendants admit the allegations contained in this paragraph.

4. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.

5. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.

6. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.

7. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the second sentence of this paragraph.

8. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in this paragraph.

9. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in this paragraph.

10. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in this paragraph.

11. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the first two sentences of this paragraph. Defendants admit that §§ 1304 and 1307 prohibit plaintiff from broadcasting advertisements or information that directly promotes the state-sponsored lottery. Defendants deny that §§ 1304 and 1307 prohibit the broadcasting of other information concerning the state-sponsored lottery, and respectfully refer the Court to those statutory provisions for a full and complete statement of their contents.

12. Defendants admit that 18 U.S.C. § 1304 prohibits the broadcast of advertistments or information that directly promotes lotteries. Defendants deny that § 1304 prohibits the broadcasting of other information concerning lotteries, and respectfully refer the Court to that provision for a full and complete statement of its contents.

13. Defendants admit that the FCC has issued administrative regulations pertaining to lottery advertising, and respectfully refer the Court to 47 C.F.R. § 73.1211 for a full and complete statement of its contents.

14. Defendants admit that 18 U.S.C. § 1307 permits radio stations licensed to locations in a state that sponsors a lottery to broadcast advertisements or information that directly promotes that lottery or the official lottery of an adjacent state. Defendants admit that 18 U.S.C. § 1307 prohibits stations licensed to locations in a state that does not have an official lottery from broadcasting advertisements and other information that directly promotes an official lottery in another state. Defendants deny that 18 U.S.C. §§ 1304 and 1307 prohibit the broadcasting of other information concerning an official state lottery by a station licensed to a location in a state that does not have an official lottery, and respectfully refer the Court to those

statutory provisions for a full and complete statement of their contents.

15. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the second and third sentences of this paragraph.

16. Defendants admit that POWER 94 is licensed by the FCC to Elizabeth City, North Carolina. Defendants have insufficient information upon which to form a belief with respect to the truth of the remaining allegations contained in this paragraph.

17. Defendants deny the allegations contained in the first sentence of this paragraph. Defendants admit the allegations contained in the second sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the third and fourth sentences of this paragraph.

18. Defendants deny the allegations contained in the first sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the remaining allegations contained in this paragraph.

19. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.

20. Defendants deny the allegations contained in this paragraph.

21. Defendants deny the allegations contained in this paragraph.

22. Defendants deny the allegations contained in this paragraph.

23. Defendants deny the allegations contained in this paragraph.

24. Defendants deny the allegations contained in this paragraph.

25. Defendants deny the allegations contained in this paragraph.

26. Defendants deny the allegations contained in this paragraph.

All averments of plaintiff's complaint not expressly admitted herein are denied.

Defendants deny that plaintiff is entitled to the relief prayed for in this action or to any relief whatsoever.

WHEREFORE, defendants pray that the instant action be dismissed with prejudice and that the Court grant defendants such other and further relief as may be appropriate.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General
HENRY HUDSON
United States Attorney

/s/ Michael Rhine
Assistant United States Attorney

/s/ Theodore C. Hirt/mhp
THEODORE C. HIRT

Of Counsel:

NANCY STANLEY
Federal Communications Commission
Washington, D.C. 20554

/s/ Margaret H. Plank
MARGARET H. PLANK
Attorneys, Department of Justice, Civil Division
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3716

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

STIPULATION

On July 7, 1989, in open court, the Court denied defendants' Motion for Summary Judgment. Defendants' Motion contained a Statement of Material Facts Not in Dispute that was based upon the uncontroverted allegations of plaintiff's Complaint and plaintiff's Admissions. In denying defendants' Motion, the Court overruled defendants' objections to the relevance and materiality of any additional facts plaintiff sought to make of record in this litigation. To facilitate the creation of plaintiff's factual record and thereby reduce the amount of time required for trial of this matter, defendants have agreed to enter into the stipulations set forth below. Defendants' agreement does not constitute a waiver of defendants' position that plaintiff's Complaint presents a facial attack on the constitutionality of 18 U.S.C. §§ 1304 and 1307, and that the facts set forth below that plaintiff sought to make of record—both those that are additional to, *see* ¶¶ 21-24, 29-31, 37, 44-67, and those that elaborate on those upon which defendants based their Motion for Summary Judgment, see ¶¶ 25-26, 33-36, 38-43—are not relevant or material to the resolution of this litigation. Neither do defendants hereby waive their position that the challenged statutes proscribe the broadcast solely of commercial speech, and that the proscription against the broadcast of commercial speech embodied in those provisions comports with the First and Fifth Amendments.

Stipulation of Uncontroverted Facts

Come now plaintiff and defendants, by and through their respective counsel, and stipulate to the facts set forth below:

1. Edge Broadcasting Company ("Edge") is a stock corporation existing under and by virtue of the laws of the Commonwealth of Virginia. Edge's studios and corporate offices are located in Virginia Beach, Virginia.

2. Edge owns the 100,000 watt radio station WMYK-FM. Power 94 is the trade name for WMYK.

3. The Federal Communications Commission ("FCC") is the agency of the United States government authorized, among other things, to license and regulate radio stations.

4. WMYK is licensed by the FCC to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina, a town located approximately three (3) miles from the border between Virginia and North Carolina. In the 1970's the FCC granted WMYK a dual identification for advertising purposes of Elizabeth City and Virginia Beach.

5. Since 1983, a broadcast licensee wishing to announce a dual identification has not required FCC approval.

6. Edge acquired the FCC license to WMYK at a closing which took place in Cleveland, Ohio, on May 28, 1988, by written assignment which had, by its terms, the effective date of May 31, 1988. The acquisition of the FCC license was pursuant to prior written consent of the FCC on March 24, 1988, Public Notice No. 20285,

Mimeo No. 2295, released March 29, 1988, FCC File No. BADLH-871230HS.

7. Edge knew at the time it acquired the FCC license to WMYK that the station was licensed by the FCC to Elizabeth City, North Carolina.

8. Acquisition of a broadcast license subjects the licensee to regulation by the FCC. At the time it acquired the license to WMYK, Edge knew or should have known of the applicable FCC statutes and regulations.

9. The radio spectrum is not large enough to accommodate an unlimited number of users. The FCC is directed to distribute channel allotments "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b).

10. All broadcast licensees are licensed to a particular community. 47 C.F.R. Part 73.1120.

11. A primary obligation of broadcast licensees is to serve the needs and interests of their community of license.

12. Dual identification does not alter a licensee's primary service obligation to its community of license.

13. The location of a station's studios or transmitter does not affect its primary obligation to serve its community of license.

14. The State of North Carolina does not sponsor a lottery.

15. N. Car. Gen. Stat. § 14.289 provides as follows:

> Except in connection with a lawful raffle as provided in Part 2 of this Article, if anyone by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or

> how it may be obtained, he shall be guilty of a misdemeanor. . .

16. N. Car. Gen. Stat. § 14.291 provides as follows:

> Except in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor.

17. At the general election on November 3, 1987, a majority of Virginia voters approved a referendum creating a state-run lottery. The lottery is designed to "produce revenue consonant with the probity of the Commonwealth and the general welfare of the people." Va. Code Ann. § 58.1-4001 (1987). The revenue produced by the lottery is to "be used for the public purpose." *Id.* The State Lottery Law created an independent agency, the State Lottery Department, which includes a director and a State Lottery Board, charged with operating the state lottery. *Id.* at § 58.1-4003. Copies of the Virginia State Lottery Law are included in the accompanying Joint Exhibits as Exhibit A.

18. Section 1304 of Title 18 of the United States Code provides that:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or

scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1304.

Section 1307 of Title 18 exempts from criminal liability

> (a) . . . an advertisement, list of prizes, or information concerning a lottery conducted by a state acting under the authority of state law—
>
> * * *
>
> (2) broadcast by a radio or television station licensed to a location in that state or an adjacent state which conducts such a lottery.

18 U.S.C. § 1307.

Corresponding regulations embodying the same substantive restrictions on lottery advertising as the statute are contained in 47 C.F.R. Part 73.1211. Title 47 U.S.C., Section 312(a) provides that the FCC "may revoke any station license . . . (6) for violation of section 1304 . . . of Title 18." The statute also provides for civil forfeiture not to exceed $1,000 upon a finding of a § 1304 violation. 47 U.S.C. § 503(b)(1)(E).

19. The purpose articulated by Congress for enacting the statutory scheme embodied in 18 U.S.C. §§ 1304 and 1307 was that of "freeing the means of communication to State-run lotteries to the maximum extent possible consistent with adequate Federal recognition of and protection for the policy of non-lottery States." S. Rep. 93-1404, 93d Cong., 2d Sess. 3 (1974).

20. Edge has neither been prosecuted nor threatened with prosecution under 18 U.S.C. §§ 1304 and 1307. Edge has not been threatened with license revocation pursuant to 47 U.S.C. § 312(a).

21. The Virginia State Lottery Board has promulgated regulations governing advertising conducted by both the Lottery Board and lottery retailers—businesses licensed

by the Director to sell and dispense lottery materials. Va. Regs. Reg. 447-01-2 § 1.1. A copy of these regulations is included in the accompanying Joint Exhibits as Exhibit B. The statutory and regulatory restrictions on Virginia lottery advertising apply to both the Lottery Department and private retailers.

22. The Office of the Attorney General has instituted a review procedure for checking Virginia state lottery advertising to determine that it complies with the statutory mandate that "no funds shall be expended for the primary purpose of inducing persons to participate in the lottery." Va. Code Ann. § 58.1-4022 (1987).

23. The Virginia lottery includes games of the "instant winner" variety. To play, a participant buys a ticket at any licensed retailer. The ticket, which costs $1.00, is imprinted with six numbers covered by a latex coating. The purchaser scratches off the coating and determines whether he or she has won. To date, the Virginia lottery has sponsored six "instant games." Each game runs 8 to 10 weeks, or until all the tickets are sold. Game 1, "Match Three" began on September 20, 1988. Game 2, "Money Match," began on October 20, 1988. Game 3, "Tic-Tac-Toe," began on December 15, 1988. Game 4, "Loose Change," commenced on February 16, 1989. Game 5, "Double Play," began on April 13, 1989. The lottery is currently sponsoring Game 6, "At the Races." Virginia anticipates launching new "instant games" approximately every eight weeks for the duration of the lottery.

24. The first "on-line" lottery game, "Pick 3," began in Virginia in May 1989. These more sophisticated games are played by computer. To play, a participant selects a group of numbers and finds out either daily or at the end of the week whether his or her selections have matched the numbers selected randomly by the Lottery Board. The Lottery Board anticipates beginning an additional "on-line" game, "Lotto," in early 1990. An-

other "on-line" game, "Pick 4," will begin in 1991. The Lottery Board anticipates continuing the "on-line" games for the duration of the lottery.

25. Information provided by the Lottery Board indicates that the Lottery Board has expended the following sums for statewide advertising for the first three instant games, excluding the cost of producing the advertisements:

Introductory Campaign (9/7-9/19)

Television	$ 691,380.00
Radio	$ 137,322.00
Newspapers	§ 374,203.00
TOTAL	$1,202,905.00

Game One (9/20-10/30)

Television	$ 694,249.00
Radio	$ 412,216.00
Newspapers	$ 495,216.00
TOTAL	$1,601,528.00

Game Two (10/20-11/27)

Television	$ 683,319.00
Radio	$ 337,145.00
Newspapers	$ 525,960.00
TOTAL	$1,467,530.00

Game Three (12/15-1/22)

Television	$ 537,934.00
Radio	$ 343,046.00
Newspapers	$ 404,161.00
TOTAL	$1,285,141.00

26. Information provided by the Lottery Board indicates that the Lottery Board anticipates spending between $1 million and $1.5 million for media buys associated with each of the instant ticket games. The Lottery Board anticipates spending approximately $2.3 million for media buys associated with introducing each of the first two "on-line games, "Pick 3" and "Lotto." The Lottery Board anticipates spending approximately $3 million a year on media buys to sustain the "on-line" games.

27. The amount of funds expended and the type, frequency, and media used for advertising the second instant game, "Money Match" are typical of the expenditures and advertising for all the instant games.

28. The advertising sponsored by the Virginia lottery for "Money Match" is representative of the advertising produced by the Virginia state lottery for each of the instant games. Copies of the scripts of the three radio spots aired throughout the duration of "Money Match" are included in the accompanying Joint Exhibits as Exhibits C1, C2, and C3. An audio tape of these three radio advertisements is included in the accompanying Joint Exhibits as Exhibit D.

29. The period for state-sponsored lottery advertising for "Money Match" was five and one-half weeks: October 20-23; October 24-29; October 30-November 6; November 7-12; November 13-19; November 20-27.

30. Copies of the scripts of the two television advertisements aired throughout the duration of "Money Match" are included in the accompanying Joint Exhibits as Exhibits E1 and E2. A videotape of these advertisements is included in the accompanying Joint Exhibits as Exhibit F.

31. Reduced copies of the proofs of the full page and "double-truck" ads (two full pages) which ran in the Virginian-Pilot and Ledger-Star throughout the duration of "Money Match" are included in the accompanying Joint Exhibits as Exhibit G.

32. Radio and television signals do not stop at state lines.

33. Those citizens of North Carolina residing within the area reached by Power 94's signal, *see* ¶ 37, *infra*, are exposed to Virginia Lottery advertisements broadcast

by Virginia television stations and Virginia radio stations, and published in Virginia newspapers.

34. There are twenty-four commercial radio stations in the Hampton Roads metro area.

35. The Lottery Board purchases radio advertising time from the following seven Hampton Roads radio stations licensed by the FCC to locations in Virginia: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. WCMS, WTAR, WLTY, WOWI, WNOR, and WNVZ are licensed to Norfolk. WFOG is licensed to Suffolk. The broadcast signals of these stations reach the area of North Carolina served by Power 94.

36. The broadcast signals of Power 94 and the Virginia radio stations from which the Virginia lottery buys advertising reach the following counties in North Carolina: Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans.

37. The population estimates of these counties utilized by Arbitron in its rating surveys are: Camden, 5000; Chowan, 11,700; Currituck, 11,900; Dare, 17,900; Pasquotank, 25,100; and Perquimans, 9,100; Total: 127,600. *See* Exhibit H in Accompanying Joint Exhibits (Population Estimates by County—Arbitron Ratings/Radio Fall 1988). The total population of North Carolina is 6,413,000. Fewer than 2% percent of all North Carolinians reside in the area reached by Power 94's signal.

38. The Arbitron Ratings Company ("Arbitron") compiled an estimate of the radio audience for a typical week in the Fall of 1988 for all radio stations, including Power 94, serving the area of dominant influence (ADI), which includes the North Carolina counties reached by Power 94's signal. The radio audience estimate is included in the Joint Exhibits as Exhibit I.

39. According to the adjusted Arbitron estimate, seventy-nine percent of all radio stations whose broadcast signals reach the area of North Carolina served by Power

94 are licensed to locations in Virginia. According to the estimate, approximately sixty-two percent of all radio listening by residents of the area in North Carolina served by Power 94 is directed to radio stations licensed to locations in Virginia. According to the adjusted Arbitron estimate, thirty-eight percent of all radio listening in the area of North Carolina reached by the broadcast signals of Power 94 and the Virginia stations identified above is directed to Virginia radio stations that broadcast lottery advertising. Eleven percent is directed to Power 94. The remaining percentage is directed to other radio stations that do not broadcast Virginia lottery advertising.

40. According to the Arbitron estimates, approximately 92.2% of Power 94's audience resides in Virginia, and approximately 7.8% resides in North Carolina.

41. During the five and one-half week advertising period for "Money Match," Virginia stations whose signals reach the area of North Carolina served by Power 94 broadcast 452 60-second spots advertising the Virginia lottery.

42. Arbitron's radio estimate gives the "average quarter-hour audience," which estimates the average number of adults, age 18 or older, in the area of dominant influence, who had their radios tuned to any particular radio station during any given quarter-hour during a typical week in the Fall of 1988. On any day, during any given quarter hour, when a Virginia radio station aired a lottery advertisement between 6:00 A.M. and midnight during the "Money Match" campaign in the area served by Power 94's signal, Arbitron's estimate shows that an average radio audience of 4,400 North Carolinians over the age of 18 had their radios tuned to Virginia radio stations.

43. On an average day during the "Money Match" campaign, a total of 12 Virginia lottery advertisements were aired over the Virginia radio stations whose signals reach the area in North Carolina served by Power 94.

Copies of the time orders for each of the Virginia radio stations broadcasting Virginia lottery advertising are included in the Joint Exhibits as Exhibit J.

44. The Lottery Board purchases advertising time from four Hampton Roads area television stations: WAVY, WVEC, WTKR, and WTVZ. Television signals generally cover a wider area than radio signals, and these television signals reach a larger area of North Carolina than Power 94.

45. All of the North Carolina counties served by Power 94 are reached by the broadcast signals of WAVY, WVEC, WTKR, and WTVZ.

46. Arbitron reports estimate that there are 53,200 television households in the area reached by Power 94's signal and the signals of the Virginia television stations that air Virginia lottery advertising.

47. Arbitron audience surveys reflect that 64% of all television viewing in these North Carolina counties is directed to Virginia television stations that air Virginia lottery advertising.

48. During the five and one-half week advertising campaign for "Money Match," a total of 274 television advertisements were broadcast by the Virginia television stations whose broadcast signals reach the North Carolina counties served by Power 94.

49. On a typical day during the five and one-half week advertising campaign for "Money Match," an average total of seven Virginia lottery advertisements were broadcast by the Virginia television stations whose broadcast signals reach the counties of North Carolina served by Power 94. Copies of the time orders specifying the time and day for Virginia lottery advertising on the Virginia television stations whose broadcast signals reach the same area as the signal of Power 94 are included in the Joint Exhibits as Exhibit K.

50. Camden County has 2,000 households. Arbitron reports indicate that 100% of these households have at least one television set. Arbitron surveys reflect that 89%

of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

51. Chowan County has 5,150 households. Arbitron reports indicate that 98% or 5,050 of these households have at least one television set. Arbitron surveys reflect that 68% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

52. Currituck County has 5,250 households. Arbitron reports indicate that 98% or 5,150 of these households have at least one television set. Arbitron surveys reflect that 68% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

53. Dare County has 7,650 households. Arbitron reports indicate that 97% or 7,450 of these households have at least one television set. Arbitron surveys reflect that 42% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

54. Gates County has 3,150 households. Arbitron reports indicate that 97% or 3,050 households have at least one television set. Arbitron surveys reflect that 82% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

55. Hertford County has 8,050 households. Arbitron reports indicate that 99% or 7,950 of these households have at least one television set. Arbitron surveys reflect that 74% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

56. Northampton County has 7,600 households. Arbitron reports indicate that 98% or 7,450 households have at least one television set. Arbitron surveys reflect that 28% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

57. Pasquotank County has 11,350 households. Arbitron reports indicate that 99% or 11,200 of these households have at least one television set. Arbitron surveys reflect that 76% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

58. Perquimans County has 3,900 households. Arbitron reports indicate that 100% or 3,900 of these households have at least one television set. Arbitron surveys reflect that 82% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising. The relevant portions of the Arbitron Television County Coverage Report, from which Stipulations 50-58 were derived, are included in the Joint Exhibits at Exhibit L.

59. The Television Bureau of Advertising estimates that in an average American household, the television set is turned on for seven hours and eight minutes per day. *See* TV Basics, included in the Joint Exhibits as Exhibit M.

60. Statistical surveys conducted by the Television Bureau of Advertising estimate that American adults divide their time spent with major media as follows: watching television—60%; listening to the radio—29%; reading magazines—4%; reading newspapers—7%. Survey conductors assume that television and radio audiences alternate between various stations while watching television or listening to the radio.

61. Nielsen surveys published by the Television Bureau of Advertising estimate that in an average television household, the television set will be turned on for 7 hours and 35 minutes per day. These surveys indicate that men watch television an average of four hours and fourteen minutes a day; women watch an average of five hours and twelve minutes a day; teenagers between the ages of twelve and seventeen watch an average of three hours and eight minutes a day; and children between the ages of two and eleven watch an average of three hours and forty minutes a day. *See* TV Basics, Exhibit M.

62. Radio industry surveys estimate that 96.1% of all American men and 95.7% of all American women over the age of 18 listen to the radio during any given week. The surveys indicate that American men over the age of 18 listen to the radio an average of 2.55 hours every day; American women over the age of 18 listen to the radio an average of 2.53 hours every day; and all Americans over the age of 12 listen to the radio an average of 3 hours a day. The same surveys estimate that 99% of all American households have radios, and that radio households average 5.6 radios per household. The same surveys estimate that 61% of all adults have radio at work and listen to the radio 53% of the time. The same surveys estimate that 95% of all automobiles have radio, and that 77% of all adults are reached every week by car radio. *See* "Why Radio," Radio Advertising Bureau Statistics, included in Joint Exhibits as Exhibit N.

63. The Lottery Board purchases newspaper advertising from the Virginian-Pilot and the Ledger-Star newspaper. The Virginian-Pilot is the morning edition; the Ledger-Star is the evening edition and the Virginian-Pilot/Ledger-Star is the Saturday morning and Sunday edition. These newspapers have circulation in the following North Carolina counties reached by Power 94 signal: Camden, Chowan, Currituck, Dare, Gates, Hertford, Pasquotank, Perquimans, and Northampton. To advertise "Money Match" and the other instant games, the Lottery Board purchased "double-truck" and full-page ads to announce the instant games and fractional ads to sustain sales. A "double-truck" ad covers two full left and right pages in a newspaper. To advertise "Money Match" and other games, the Virginia Lottery Board runs ads during introductory periods on the average of two times a week in the daily editions of the Virginian-Pilot and the Ledger Star and one ad in the weekend editions of the Virginian-Pilot/Ledger Star. These newspapers regularly publish news stories about the Virginia lottery.

64. During weekdays in the five and one-half week advertising period for "Money Match," 10,377 Virginia newspapers containing Virginia lottery advertisements were distributed in the North Carolina counties which are reached by Power 94's signal.

65. On Saturdays during the five and one-half week advertising period for "Money Match," 11,241 newspapers containing Virginia lottery advertisements were distributed in the North Carolina counties reached by Power 94's signal.

66. On Sundays during the five and one-half week advertising period for "Money Match," 12,498 newspapers containing Virginia lottery advertisements were distributed in the North Carolina counties reached by Power 94's signal. *See* Audit Bureau of Circulations, ABC Audit Report: Newspaper, the Virginian-Pilot (morning), the Ledger-Star (evening), the Virginian-Pilot/Ledger-Star (Saturday morning and Sunday) (April 1988), included in the accompanying Joint Exhibits as Exhibit O.

67. North Carolina newspapers regularly report news and information pertaining to the Virginia lottery.

68. There are approximately 1,414 business establishments in the Hampton Roads metro area that have been selected to sell Virginia Lottery tickets to the general public. Many of these outlets include in their advertising copy the fact that they sell Virginia lottery tickets.

69. There will likely continue to be private business establishments in the Hampton Roads metro area that will continue to include their affiliation with the lottery in their advertisements.

/s/ Conrad M. Shumadine
CONRAD M. SHUMADINE
WILLCOX & SAVAGE, P.C.
1800 Sovran Center
One Commercial Place
Norfolk, VA 23510-2197
Attorney for Plaintiff

/s/ Margaret H. Plank
MARGARET H. PLANK
Federal Programs Branch
Department of Justice
10th & Pennsylvania Ave.
Washington, D.C. 20530
Attorney for Defendants

NOTE

RE: IDENTIFICATION OF EXHIBITS

In the stipulation, the parties identified the exhibits by letter and referred to a document called "Joint Exhibits." Since the court has ruled that all of plaintiff's trial exhibits are admissible, to avoid cluttering the record, POWER 94 has referred to the numbered trial exhibits both in its brief and in the supplemental affidavits submitted in lieu of live testimony. The chart below indicates the names of the exhibits referred to in the stipulation and the comparable number in the trial exhibits.

CHART

Joint Exhibit Number	Exhibit Description	Trial Exhibit Number
A	Virginia State Lottery	Law P/T No. 1
B	Virginia State Lottery Regulations	P/T No. 5
C1, C2 and C3	Scripts of three radio spots aired throughout the duration of "Money Match"	P/T Nos. 2, 3, and 4
D	Audio tape of lottery radio advertisements	P/T No. 6
E1 and E2	Copies of scripts of two television advertisements aired throughout "Money Match"	P/T Nos. 7, and 8
F	Videotape of lottery television advertisements	P/T No. 9
G	Full-page and double-truck ads which appeared in *The Virginian-Pilot* and *The Ledger-Star* throughout "Money Match"	P/T Nos. 10, 11, and 12
H	Population estimates by county—Arbitron's Rating/Radio, Fall, 1988	P/T No. 13

Joint Exhibit Number	Exhibit Description	Trial Exhibit Number
I	Weekly radio audience estimate compiled by Arbitron Ratings Company dated Fall, 1988	P/T No. 14
J	Copies of time orders for each Virginia radio station broadcasting lottery advertising	P/T Nos. 15, 16, 17, 18, 19, and 20
K	Time orders for Virginia lottery advertising on Virginia television stations	P/T Nos. 21, 22, 23, and 24
L	Excerpts from Arbitron Television County Coverage Report	P/T No. 25
M	TV basics	P/T No. 26
N	"Why Radio?," Radio Advertising Bureau of Statistics	P/T No. 27
O	ABC Audit Report: Newspaper, *The Virginian-Pilot* (morning), *The Ledger-Star* (evening), *The Virginian-Pilot* and *The Ledger-Star* (Saturday morning and Sunday), dated April, 1989	P/T No. 28

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

I, Michael C. Knaisch, being duly sworn, state as follows:

1. I am Vice President and Group Supervisor at Lawler Ballard, the agency which was awarded the contract to promote the Virginia State Lottery.

2. I am account supervisor for the Virginia State Lottery account.

3. Lawler Ballard has submitted all its copy to the Office of the Virginia Attorney General and has obtained the approval of the Attorney General before promulgating any of the lottery advertising.

4. The advertising sponsored by the Virginia lottery for the second instant game, "Money Match," is representative of the advertising produced by the Virginia state lottery for each of the instant games. The amount of funds expended and the type, frequency, and media used for advertising "Money Match" are typical of the expenditures and advertising for all the instant games.

5. Copies of the scripts of the three radio spots aired on WCMS, WFOG, WTAR, WLTY, WOWI, WNOR, and WNVZ, and WTAR-AM throughout the duration of "Money Match," included in Plaintiff's response to Defendants' Motion for Summary Judgment, are genuine and representative of the radio advertising produced by the Lottery for all of the instant games.

6. Copies of the scripts of the two television advertisements aired throughout the duration of "Money Match" included in Plaintiff's response to Defendants' Motion for Summary Judgment, are genuine and are representative of the television advertising produced by the Lottery for all of the instant games.

7. Reduced copies of the proofs of the full page and "double-truck" ads (two full pages) which ran in The Virginian-Pilot and Ledger-Star throughout the duration of "Money Match" genuine [*sic*] and are representative of the newspaper advertisements produced by the lottery for all the instant games.

8. Few people receive all of their information from one media or even from one segment of a particular type of media. Televisions [*sic*] viewers tend to switch from station to station depending on programming and content. Radio listeners tend to switch from station to station. Newspaper readers also tend to read books, magazines and other periodicals in addition to a particular newspaper. The same people who watch television also listen to the radio and read newspapers.

9. There is no identifiable group of class of individuals within the area reached by Power 94's signal that would listen exclusively to North Carolina radio stations, watch only North Carolina television stations, or read only publications published in North Carolina. In fact, Virginia television and radio stations are the predominant choice of viewers and listeners in this area.

10. Those citizens of North Carolina residing within the area reached by Power 94's signal are constantly exposed to Virginia Lottery advertisements on the Virginia television stations, on the Virginia radio stations, and in the Virginia published newspapers.

11. The Lottery Board purchases radio advertising from the following Hampton Roads radio stations: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. WCMS, WTAR, WLTY. WOWI, WNOR, and WNVZ are licensed to Norfolk. WFOG is licensed to Suffolk. All these stations broadcast into the area of North Carolina reached by Power 94.

12. During the five and one-half week advertising period for "Money Match," Virginia radio stations broadcast 452 60-second spots advertising the Virginia lottery into the area of North Carolina reached by Power 94's signal.

13. On an average day during the "Money Match" campaign, 12 Virginia lottery advertisements were aired over the 7 Virginia radio stations, serving the area in North Carolina reached by Power 94's signal.

14. The Lottery Board purchases advertising from four Hampton Roads television stations: WAVY, WVEC, WTKR and WTVZ.

15. During the five and one-half week advertising campaign for "Money Match," 274 television advertisements were broadcast by the Virginia television stations serving the North Carolina counties reached by Power 94's signal.

16. On a typical day during the five and one-half week advertising campaign for "Money Match," Virginia television stations broadcast an average of seven Virginia lottery advertisements into the area reached by Power 94's signal.

17. It is not cost effective for advertisers to produce special advertisements solely to be run on Power 94 as opposed to the Hampton Roads radio stations as a group.

/s/ Michael C. Knaisch

STATE OF VIRGINIA
CITY OF NORFOLK

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Michael C. Knaisch, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

This 15th day of June, 1989.

/s/ [Illegible]

Notary Public

My commission expires:
7/24/89

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

Kenneth W. Thorson, being first duly sworn, states:

1. I am the Director of the Virginia State Lottery ("Lottery"). I was appointed by the Governor of Virginia on December 4, 1987.

2. I have personal knowledge of the facts stated herein.

3. The Office of the Attorney General of the Commonwealth of Virginia has instituted a review procedure for checking Virginia state lottery advertising to determine that it complies with the statutory mandate contained in § 51.1-4002 of the Virginia Code that "no funds shall be expended for the primary purpose of inducing persons to participate in the lottery."

4. The Attorney General has determined that the Virginia statutory and regulatory restrictions on Virginia lottery advertising apply both to the Lottery Department and Virginia retailers. Lawler Ballard Advertising, the advertising agency which was awarded the contract for

the Commonwealth's lottery advertising, has submitted all its advertising copy to the Office of the Virginia Attorney General and has obtained approval of the Attorney General before promulgating any of the lottery advertising.

5. The Virginia lottery includes games of the "instant winner" variety. To play, a participant buys a ticket at any licensed retailer. The ticket, which costs $1.00, is imprinted with six numbers covered by a latex coating. The purchaser scratches off the coating and determines whether he or she has won. To date, the Virginia lottery has sponsored five "instant games"; each game runs approximately 8 to 10 weeks or until all the tickets are sold. Games 1, "Match Three" began on September 20, 1988. Game 2, "Money Match", began on October 20, 1988. Game 3, "Tic-Tac-Toe", began on December 15, 1988. Game 4, "Loose Change" commenced on February 16, 1989. Game 5, "Double Play", began on April 13, 1989. New "instant games" will be launched approximately every eight weeks for the duration of the lottery.

6. The first of the "on-line" games, "Pick 3", began in Virginia on May 22, 1989. These more sophisticated games are played by computer. To play a participant selects a group of numbers and finds out either daily or at the end of the week whether his or her selections have matched the numbers selected randomly by the Lottery. The Lottery anticipates beginning an additional "on-line" game, "Lotto", in early 1990. Another "on-line" game, "Pick 4", will begin in 1991. The "on-line" games will continue throughout the life of the lottery.

7. The Lottery has expended the following sums for state wide advertising for the first three instant games, excluding the cost of producing the advertisements.

Introductory Campaign (9/7-9/19)

Television	$ 691,380.00
Radio	$ 137,322.00
Newspapers	$ 374,203.00
TOTAL	$1,202,905.00

Game One (9/20-10/30)

Television	$ 694,249.00
Radio	$ 412,216.00
Newspaper	$ 495,216.00
TOTAL	$1,601,528.00

Game Two (10/20-11/27)

Television	$ 683,319.00
Radio	$ 337,145.00
Newspaper	$ 525,960.00
TOTAL	$1,467,530.00

Game Three (12/15-1/22)

Television	$ 537,934.00
Radio	$ 343,046.00
Newspaper	$ 404,161.00
TOTAL	$1,285,141.00

8. The Lottery anticipates spending between $1 million and $1.5 million for media buys associated with each of the instant ticket games. The Lottery anticipates spending approximately $2.3 million for media buys associated with introducing each of the first two "on-line" games, "Pick 3" and "Lotto". The Lottery anticipates spending approximately $3 million a year on media buys to sustain the "on-line" games.

9. The advertising sponsored by the Virgina lottery for the second instant game, "Money Match," is representative of the advertising produced by the Virginia state lottery for each of the instant games. The amount of funds expended and the type, frequency, and media used for advertising "Money Match" are typical of the expenditures and advertising for all the instant games.

10. The period for state-sponsored lottery advertising for Money Match was five and one-half weeks: October 20-23; October 24-29; October 30-November 6; November 7-12; November 13-19; November 20-27.

11. The Lottery purchases radio advertising from the following Hampton Roads radio stations: WCMS-FM, WCMS-AM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WNOR-AM, WOWI-FM, and WNVZ-FM, WCMS, WTAR, WLTY, WOWI, WNOR, and WNVZ are licensed to Norfolk. WFOG is licensed to Suffolk. The Lottery purchases television advertising from the following Hampton Roads television stations: WAVY, WVEC, WTKR, and WTVZ.

12. The Lottery purchases newspaper advertising from The Virginian-Pilot and The Ledger-Star newspapers.

13. Copies of the press relcases, promulgated by the Lottery since the inception of the lottery, included in Plaintiff's response to Defendants' Motion for Summary Judgment are genuine.

14. There are approximately 1,414 business establishments in the Hampton Roads area which have been selected to sell Virginia Lottery tickets to the general public. Of those retailers who advertise, many include in their advertising copy the fact that they sell Virginia Lottery tickets.

/s/ Kenneth W. Thorson
KENNETH W. THORSON

STATE OF VIRGINIA
CITY OF RICHMOND

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Kenneth W. Thorson, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

This 15th day of June, 1989.

/s/ Sandra S. [illegible]

Notary Public

My commission expires:
Feb. 15, 1993

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-69-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

I, Paul Lucci, being first duly sworn, state as follows:

1. I am the President and General Manager of Plaintiff Edge Broadcasting Company ("Edge").

2. I have personal knowledge of the facts stated herein.

3. I have extensive knowledge and experience with all facets of the radio and television broadcasting industry, including engineering, programming, sales, management and ownership.

4. I was one of the original shareholders and founding members of the Television Corporation of Virginia, the Television Corporation of North Carolina, and the Television Corporation of Richmond, the licensees of Channel 33 in Norfolk, Channel 45 in Winston-Salem, North Carolina, and Channel 35 in Richmond, Virginia. These companies, among others, formed the public company, TVXG, the TVX Brodcasting Group, which is now believed to be the largest owner of independent television stations in the world.

5. Edge is a stock corporation existing under and by virtue of the laws of Virginia. Edge's studios and corporate offices are located in Virginia Beach, Virginia.

6. Edge owns the 100,000-watt radio station WMYK-FM. POWER 94 is the trade name for WMYK.

7. WMYK is licensed by the Federal Communications Commission ("FCC") to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina, a town located approximately 3 miles from the Virginia/North Carolina boundary. The FCC has given POWER 94 a dual identification of Elizabeth City and Virginia Beach.

8. Those citizens of North Carolina residing within the area reached by POWER 94's signal are inundated with Virginia Lottery advertisements on the Virginia television stations, on the Virgina radio stations, and in the Virginia published newspapers.

9. No governmental interest of any kind or nature is furthered in any way by the federal laws prohibiting POWER 94 from broadcasting the same speech which reaches its North Carolina listeners via competitive radio stations, on television, and in newspapers.

10. The statutes and regulations forbidding POWER 94 from broadcasting any Virginia lottery information and advertising operate to disadvantage POWER 94 vis-a-vis its similarly situated competitors.

11. Preventing POWER 94 from broadcasting Virginia lottery advertising and information is not rationally related to any asserted governmental goal and the classification found in the challenged laws here are arbitrary and irrational.

12. I computed the statistics regarding the reach of Virginia lottery advertising in the area in North Carolina served by POWER 94 by using the Fall 1988 Arbitron Ratings for Radio, a report generally used and relied upon by people in the radio broadcasting industry to make advertising, marketing and programming decisions.

13. 92.2 percent of POWER 94's audience resides in Virginia; 7.8 percent of POWER 94's audience resides in North Carolina.

14. The signals of POWER 94 and the Virginia radio stations from which the Virginia lottery buys advertising reach the following counties in North Carolina: Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans.

15. The population estimates of these counties are: Camden, 5,000; Chowan, 11,700; Currituck, 11,900; Dare, 17,900; Gates, 8,300; Hertford, 19,900; Northampton, 18,700; Pasquotank, 25,100; and Perquimans, 9,100 or a total population estimate of 127,600. These figures are derived from the Arbitron Ratings for Radio for Fall 1988.

16. The Arbitron Ratings Company, Arbitron, compiled an estimate of the radio audience for a typical week in the Fall of 1988 for all radio stations, including POWER 94, serving the area of dominant influence (ADI), which includes the North Carolina counties reached by POWER 94's signal: Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans. Seventy-nine percent of all radio stations serving this area are licensed to locations in Virginia.

17. Within the area of North Carolina served by POWER 94 and the Virginia radio stations broadcasting Virginia lottery advertising, approximately sixty-two percent of all radio listening is directed to Virginia radio stations. Thirty-eight percent of all radio listening is directed to Virginia radio stations which broadcast Virginia lottery advertising. Eleven percent of all this radio listening is directed to POWER 94.

18. Arbitron's radio estimate establishes the "average quarter-hour audience" which gives the average number of adults, age 18 or older, in the area of dominant influence, who listened to any particular radio station during any given quarter-hour during a typical week in the Fall of 1988. On any day, during any given quarter hour,

when a Virginia radio station aired a lottery advertisement between 6:00 A.M. and midnight during the "Money Match" campaign in the area served by POWER 94's signal, an average radio audience of 4,400 North Carolinians over the age of 18 were listening to Virginia stations.

19. Few people receive all of their information from one media or even from one segment of a particular type of media. Televisions viewers tend to switch from station to station depending on programming and content. Radio listeners tend to switch from station to station. Newspaper readers also tend to read books, magazines and other periodicals in addition to a particular newspaper. The same people who watch television also listen to the radio and read newspapers.

20. There is no identifiable group of class of individuals within the area reached by POWER 94's signal that would listen exclusively to North Carolina radio stations, watch only North Carolina television stations, or read only publications published in North Carolina. In fact, Virginia television and radio stations are the predominant choice of viewers and listeners in this area.

21. The following statistics are derived from a Report, entitled "Why Radio", prepared by the Radio Advertising Bureau. This Report is generally used and relied upon by persons in the radio broadcasting industry. 96.1% of all American men and 95.7% of all American women, over the age of 18, listen to the radio during the week. American men, over the age of 18, listen to the radio an average of 2.55 hours every day. American women, over the age of 18, listen to the radio an average of 2.53 hours every day. Americans, age 12 and older, average approximately 3 hours of radio listening everyday. 99% of all American households have radios; those households have an average of 5.6 radios per household. 61% of all adults have radio at work and listen to the radio 53% of the time. 95% of all automobles [*sic*] have radio; 77% of all adults are reached weekly by car radio alone.

22. Television signals generally cover a wider area than radio signals, and the television signals from WAVY, WVEC, WTKR and WTVZ reach a larger area of North Carolina than the signal transmittted by POWER 94.

23. All the North Carolina counties served by POWER 94's signal, Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, Perquimans, are also served by WAVY, WTKR, WVEC and WTVZ, the television stations from which the Virginia Lottery Board buys advertising.

24. The statistics regarding the percentage of television viewing and the number of television households in the North Carolina counties served by POWER 94's signal are derived from The Arbitron Television County Coverage Report. This Report is generally used and relied upon by individuals in the television broadcasting industry, who use the Report to make advertising, marketing and programming decisions.

25. In the North Carolina counties of Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans, 64% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

26. There are 53,200 television households in the area reached by POWER 94's signal and the Virginia television stations which broadcast Virginia lottery advertising.

27. Camden County has 2,000 households. 100% or 2,000 households have at least one television set. 89% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

28. Chowan County has 5,150 households. 98% or 5,050 households have television sets. 68% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

29. Currituck County has 5,250 households. 98% or 5,150 households have television sets. 68% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

30. Dare County has 7,650 households. 97% or 7,450 households have television sets. 42% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

31. Gates County has 3,150 households. 97% or 3,050 households have television sets. 82% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

32. Hertford County has 8,050 households. 99% or 7,950 households have television sets. 74% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

33. Northampton County has 7,600 households. 98% or 7,450 households have television sets. 28% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

34. Pasquotank County has 11,350 households. 99% or 11,200 households have television sets. 76% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

35. Perquimans County has 3,900 households. 100% or 3,900 households have television sets. 82% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

36. The following statistics are derived from a Report entitled TV Basics 1987-1988, compiled by the Television Bureau of Advertising. This Report is generally used and relied upon by individuals in the television broadcasting industry. The average American watches television for seven hours and eight minutes per day.

37. American adults divide their time spent with major media as follows: watching television—60%; listening to the radio—29%; reading magazines—4%; reading newspapers—7%. Television and radio audiences alternate between various stations while watching television or listening to the radio.

38. In an average week, at 7:35 A.M., 94% of all television households are watching television; during an average week, at 4:14 P.M., 88% of all American men are watching television; in an average week, at 5:12 P.M., 91% of all American women are watching television; during an average week, at 3:08 P.M., 90% of all teenagers between the ages of 12 and 17 are watching television; during an average week, at 3:40 P.M., 92% of all children between the ages of 2 and 11 are watching television.

39. POWER 94 has difficulty in determining what type of "information" is barred by the federal laws and consequently does not broadcast any news or information concerning the Virginia lottery and has not broadcast any of the press releases provided to it by the Lottery Board.

40. WCMS-FM, WFOG-FM, WTAR-AM, WLTY-FM, WOWI-FM, WNOR-FM and WNVZ-FM, POWER 94's competitors, broadcast Virginia lottery news and press releases as a matter of course. News stories are more likely than advertising to promote the Lottery.

41. WHRO, the public television station licensed to Norfolk and broadcasting into the North Carolina counties reached by POWER 94, broadcasts live the nightly drawing of the winning numbers in the lottery's Pick-3 game. WAVY, WTKR, and WVEC also broadcast the winning numbers in Pick-3 as part of their nightly news programming.

42. The statutes and regulations prohibit POWER 94 from broadcasting newsworthy information about the Virginia lottery even though its competitors and others regularly disseminate such information within the area of North Carolina served by POWER 94's signal.

43. Some Virginia businesses, such as 7-11, have developed promotions featuring Virginia Lottery tickets. POWER 94 is unable to even carry such advertisements on any basis.

44. WOWI is POWER 94's principal competitor. WOWI has broadcast a parody based on POWER 94's

inability to run lottery advertising or engage in lottery promotions. WOWI is free to air lottery-related advertisements and consequently has gained a competitive advantage over POWER 94. A script of this parody included with Plaintiff's response to Defendants' Motion for Summary Judgment is genuine.

45. The vast majority of radio advertisements are prepared in advance and are taped rather than announced live over the air. Taping assures that the advertisement will fit in its allocated time span, that the announcer will make no mistakes, that the appropriate voice or talent is utilized, that audio effects are appropriately coordinated, and that the maximum impact is achieved. Producing a perfect tape that achieves the desired effect is difficult and requires a substantial amount of time as well as creative and artistic talent. Each part of the advertisement is intended to coordinate with the other parts to create a unified, hard hitting, effective selling message. Many establishments which sell Virginia Lottery tickets include this fact in their pre-prepared radio advertising tapes. Eliminating the reference for the Virginia Lottery from the tapes means that the tapes will run for less than the allotted time. In many cases, the elimination of the reference destroys the continuity and unity of the advertisement.

46. Radio advertisers prepare a taped advertisement for use on all radio stations in the market and do not prepare separate tapes for use on individual stations. Accordingly, if a pre-prepared taped advertisement contains a message concerning the Virginia Lottery, POWER 94 must either delete that message or refuse to run the advertisement no matter whether the deletion adversely affects the advertising copy. If POWER 94 deletes references to the Virginia Lottery from advertisements, the advertiser receives fewer seconds of exposure than the advertiser is paying for.

47. Many advertisers whose copy refers to the Virginia lottery have decided not to include POWER 94 in

or have removed POWER 94 from their advertising schedules upon learning that federal law bars POWER 94 from broadcasting any advertising which refers to the Virginia lottery. A number of advertisers have not even contacted POWER 94 because they have learned that the station is forbidden from broadcasting Virginia lottery information. Some merchants have refused to have their advertisements altered to delete Virginia lottery references and POWER 94 has been forced to reject their advertisements. For example, the following businesses wanted to advertise lottery-related messages on POWER 94 but declined to alter their advertising copy, and consequently POWER 94 was forced to reject their business:

a. POWER 94 was forced to take an advertisement for Furniture City off the air when it discovered that the ad referred to the Virginia lottery. As a result, POWER 94 lost the $1,100.00 buy.

b. When Brown Convenience Stores learned of the federal ban on lottery-related advertising, it declined to make a proposed buy advertising its status as a lottery ticket outlet and POWER 94 lost $6,000.00.

c. F&S Convenience Store declined to make a $2,000.00 advertising buy after learning that POWER 94 could not air its lottery-related advertising.

d. POWER 94 was forced to take an advertisement for Bill Lewis Chevrolet off the air when it discovered that the advertisement referred to the Virginia lottery. As a result, POWER 94 lost the $1,200.00 buy.

e. Frankie Stewart, a dance promoter, sought to purchase lottery-related advertising on POWER 94, but because the station could not run his copy, he cancelled the order and POWER 94 lost this $400.00 buy.

f. FX, a stereo and appliance retailer, refused to allow POWER 94 to alter its advertising referring to the Virginia lottery, and consequently POWER 94 lost this $510.00 buy.

g. In September, 1988, POWER 94 was forced to refuse 7-11's request to air $4,000.00 worth of advertising touting 7-11's status as a lottery ticket retailer. Again in April, 1989, POWER 94 was forced to reject 7-11's request to purchase approximately $4,000.00 worth of lottery-related advertising. 7-11 placed this lottery-related advertising on POWER 94's principal competitor, WOWI.

h. Another local business, Ebony Showcase, declined to to [*sic*] purchase advertising when it learned that it could not refer to the Virginia lottery.

i. The advertising agencies representing Gene Walters and Farm Fresh, Hampton Roads supermarket chains which sell lottery tickets, wanted to advertise their status as retailers on POWER 94 but were precluded from doing so by the federal ban on lottery-related advertising.

48. After POWER 94 offered to reduce its rates from $40.00 to $25.00 per announcement, Allied Showroom Catalog agreed to produce a special copy to air on POWER 94 to ensure that POWER 94 would not violate the federal ban on lottery advertising. Sentry Food Mart agreed to allow POWER 94 to delete the portion of its advertisement which touted the store as an outlet for lottery tickets, in order to ensure that POWER 94 did not violate the federal laws and regulations challenged here.

49. In the spring of this year, I personally called on Bob Wich, the chief executive of Be-Lo, to ask him to consider adding POWER 94 to the stations from which Be-Lo buys advertising on an annual basis. After extended discussions, Be-Lo agreed and POWER 94 began to run Be-Lo's advertisements in the spring. In June of 1989, Be-Lo submitted a tape touting its status as an outlet for Virginia lottery tickets. POWER 94 had to remove the tape from the air and then convince Be-Lo to produce a separate advertisement to be aired on POWER 94 only. Be-Lo reluctantly agreed to do so, but it is questionable whether it will continue to provide POWER 94 with separate advertising copy in the future.

50. None of POWER 94's advertising accounts, except for Allied Catalog Showroom, Sentry Food Mart, and Be-Lo's have been willing to tailor any lottery based advertisements in order to continue advertising on POWER 94.

/s/ Paul Lucci
PAUL LUCCI

STATE OF VIRGINIA
CITY OF NORFOLK

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Paul Lucci, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

This 20th day of June, 1989.

/s/ Paulette D. Hart
Notary Public

My commission expires:
May 8, 1992

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, DEFENDANTS

SUPPLEMENTAL AFFIDAVIT

I, Paul Lucci, being first duly sworn, state as follows:

1. I am making this Affidavit to supplement the Affidavit which I submitted in opposition to the defendants' Motion for Summary Judgment and which is part of the record in this case.

2. POWER 94 does not broadcast any information at all which pertains to the Virginia lottery. I have issued a blanket order directing my staff not to air any stories about the Virginia lottery. The law states that no "information" about a lottery may be broadcast; this broad language—forbidding the broadcast of lottery "information"—outlaws newsworthy items.

3. I have read and consulted with my attorneys about the case law and FCC declaratory rulings in an effort to determine what items may be broadcast. I studied, for example, the FCC's Supplemental Declaratory Ruling, 21 FCC 2d 846 (February 26, 1970), stating that matters which directly promote a lottery may not be broadcast, but received little guidance from this ruling. I have not been able to apply the standard satisfactorily to decide

which stories I should not broadcast. I would also like to air news stories about the new lottery games as they come onboard, as well as other features concerning the lottery, including items about its great success and even about the participation of North Carolinians in the lottery. For instance, I would like to broadcast the numbers which are drawn daily by the Lottery Board in its first instant computer game, "Pick 3." WHRO, the local public television station licensed to Norfolk and broadcasting into the counties POWER 94 reaches in North Carolina, nightly broadcasts the drawing of the instant winning number. The other local television stations also air the winning numbers. POWER 94 does not broadcast the winning numbers because I fear that I would be prosecuted or subject to administrative penalties if I violate the law.

POWER 94 does not broadcast any lottery news items whatsoever for fear of federal prosecution. We do not broadcast any of the press releases issued by the State Lottery Department even though our radio competitors and other media which reach the same parts of North Carolina as POWER 94 broadcast this and other lottery information as a matter of course. *See* Plaintiff's Exhibits Nos. 29-128. For example, Plaintiff's Exhibit No. 59, a lottery press release dated Monday, September 12, 1988, features the results of a telephone survey of 1,018 adults conducted between August 3 and August 29, 1988, an item which would be of interest to our listeners. The survey revealed that a greater percentage of Virginians would vote in favor of the lottery on the day of the poll than they did in the November, 1987, referendum. The survey also revealed that two-thirds of the Virginians polled are likely to buy a lottery ticket. Our listeners care about their fellow citizens' views and responses to the lottery. I would like to air a story based on this information but would it directly promote the lottery? With my license on the line, I can not [*sic*] risk airing this information.

A press release dated September 19, 1988, (Plaintiff's Exhibit 62) providing the details of one of the lottery's

instant games is another example of the type of information our listeners would like to hear but which we do not air. That release provided the basics about "Match 3," one of the lottery's instant games. We would like to broadcast that $50,000,000 in prizes were available; that 100,000,000 tickets were printed; and that the tickets would be sold on a specific day. I do not know if these facts are "information" prohibited by law, and therefore we do not broadcast it or any other information about specific lottery games.

The Virginia lottery news release of February 15, 1989, (Plaintiff's Exhibit 13) again exemplifies information we deem newsworthy but are afraid to air. This release noted that Virginia lottery ticket sales reached the $250,000,000 mark on February 14, that Virginia had one of the best start-ups in the history of the lottery industry and that during the months of October and November of 1988 Virginia sold the greatest number of instant lottery tickets in the United States. Our listeners are interested in these facts. Does such information promote the lottery? With our license on the line, we dare not find out.

The newspaper stories included as plaintiff's Exhibits Nos. 138 through 147, 149-150, 152, 155, 157, 166, and 188 are also indicative of the types of information we would like to broadcast but do not. A front page article appearing in *The Virginian Pilot* on Friday, May 19, 1989 (Plaintiff's Exhibit No. 149) contains lottery information about the new computer games. The article reports that lottery experts say that the new daily numbers games appeal primarily to urban, working-class gamblers. This information would be of great interest to the many urban, working class listeners who make up air audience. The article answers questions like "How do I play 'Pick 3'?"; "What are the odds?"; "Where do I bet?"; "How can I bet?"; "How much can I bet?"; "How often are the drawings?"; and "If I win, how do I claim my prize?" The answers to such inquiries are of interest to our listeners. Since the FCC has said that specific infor-

mation as to where, how, and when winning tickets will be drawn falls within the ambit prohibited broadcasts, POWER 94 does not broadcast specific information about the new computer games.

Another newspaper article (plaintiff's Exhibit No. 57) contains additional interesting material which POWER 94 would broadcast. On the both [*sic*] first and second days of the new computer game, many bettors picked the numbers 5-2-2, numbers reflecting the day on which the new computer game began. The numbers came up on the second day and the state paid $868,950 in prizes on the 5-2-2 winning sequence while taking in only $503,127. This material is about people like our listeners and matters to them. Similarly, an article appearing in The Virginian Pilot on Thursday, June 1, 1989, explains how Hampton Roads leads Virginia in "Pick 3" sales. (Plaintiff's exhibit 166). In the first 8 days, Hampton Roads gamblers, undoubtedly including many POWER 94 listeners, bet $1,251,632 on the nightly number drawings. Interestingly, many bettors picked the 7-4-5 sequence, the sample number printed in a department brochure on how to play "Pick 3." The number came up and many players won. This data appeals to our listening audience. The FCC might find that it directly promotes the lottery, however, and consequently POWER 94 remains silent.

4. I also refrain from directing our staff to risk violating the law because I do not want to besmirch my reputation in the broadcast industry. As the owner of POWER 94, I cannot afford to jeopardize the station or my own integrity in any way.

5. I am well aware of POWER 94's obligation to serve the citizens of Elizabeth City, North Carolina. We strive very hard to meet this obligation. For instance, we broadcast weather warnings for Elizabeth City and the surrounding area. We provide a toll-free line for North Carolinians to reach us. We report on community issues there. We are heavily involved in public service activities

in Elizabeth City and are especially proud of our recruiting effort on the campus of Elizabeth City State University. The citizens of Elizabeth City, however, are not served by the operation of the present ban on Virginia lottery information. The majority of POWER 94's competitors and other Virginia media bombard Elizabeth City with the same information and advertising which we may not broadcast. The only effect of the laws is to deprive POWER 94 of revenues necessary to maintain our operation and to serve the residents of Elizabeth City. The law has weakened and will continue to weaken POWER 94 economically by depriving it of significant sources of revenue. To weaken POWER 94 will not serve the citizens of North Carolina.

6. The economic consequences visited upon POWER 94 by the challenged laws are serious. I have studied our client history report dated May 26, 1989, a report generated in the ordinary course of our business, which lists all of our current advertisers. (Plaintiff's Exhibit 132). Of the 999 enterprises that advertise on POWER 94, only 17 are located in North Carolina. Of all POWER 94's advertisers, .017% reside in North Carolina. As a result, POWER 94's economic existence is contingent upon its ability to attract Virginia advertisers. POWER 94 could not survive as a station if we had to rely solely upon our North Carolina advertisers. Our North Carolina competitors offer advertising at significantly lower rates. The law handicaps us in our ability to attract advertisers who wish to announce an affiliation with the Virginia lottery and bestows a real economic advantage upon our competitors.

7. The majority of the stations which broadcast Virginia lottery advertising into the area in North Carolina served by POWER 94's signal compete directly with POWER 94 for advertising revenues. Except for their cities of licensure, these stations compete for revenues on the same basis as POWER 94.

8. The following 33 American jurisdictions now operate lotteries: Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

9. Plaintiff's exhibits 133 and 134 provide examples of advertising copy submitted by potential advertisers which POWER 94 has had to reject because they contained references to the Virginia lottery.

Dated: July 19, 1989

/s/ [Illegible]

STATE OF VIRGINIA
CITY OF NORFOLK

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Paul T. Lucci, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

/s/ Paulette D. Hart
Notary Public

My commission expires:
May 8, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

I, William Eisenbeiss, being first duly sworn, do state as follows:

1. I am Vice President and Advertising Director of *The Virginian-Pilot* and *The Ledger-Star*.

2. I have personal knowledge of the facts stated herein.

3. The Lottery Board purchases advertising from *The Virginian-Pilot*, *The Ledger-Star* and *The Virginian-Pilot and The Ledger-Star* newspapers. *The Virginian-Pilot* is the morning edition; *The Ledger-Star* is the evening edition; and *The Virginian-Pilot and The Ledger-Star* is the Saturday morning and Sunday edition. These newspapers serve the following North Carolina counties: Camden, Chowan, Currituck, Dare, Gates, Hertford, Pasquotank, Perquimans, and Northampton. The Lottery Board purchases "double-truck" full-page ads, and fractional page ads concerning "Pick 3," and "Money Match" and other instant games in these newspapers. A

"double-truck" ad is one ad which covers two full left and right pages in a newspaper. The Virginia Lottery Board runs ads during introductory periods on an average of two times a week in the daily editions of *The Virginian-Pilot* and *The Ledger-Star* and one ad in the weekend editions of *The Virginian-Pilot and The Ledger-Star.*

4. The following statistics concerning the distribution of newspapers are based on "The Audit Bureau of Circulations, Audit Report: Newspaper, *The Virginian-Pilot* (Morning), *The Ledger-Star* (Evening), *The Virginian-Pilot and The Ledger-Star* (Saturday Morning and Sunday) (April 1989)." This Audit Report is generally used and relied on by those involved in the newspaper publishing industry.

5. During a weekday in which an ad appeared in the five and one-half week advertising period for the instant game, "Money Match," according to ABC figures an average of 10,377 newspapers of *The Virginian-Pilot/Ledger-Star* containing Virginia Lottery advertisements were distributed in the North Carolina counties described above.

6. On Saturdays in which an ad appeared during the five and one-half week advertising period for "Money Match," according to ABC figures, an average of 11,241 newspapers of *The Virginian-Pilot and The Ledger-Star* containing Virginia Lottery advertisements were distributed in the North Carolina counties described above.

7. During a Sunday in which an ad appeared during the five and one-half week advertising period for "Money Match," according to ABC figures, 12,498 newspapers of *The Virginian-Pilot and The Ledger-Star* containing Virginia Lottery advertisements were distributed in the North Carolina counties described above.

/s/ William Eisenbeiss
WILLIAM EISENBEISS

STATE OF VIRGINIA
CITY OF NORFOLK, to-wit:

Before me, a Notary Public in and for the State and City aforesaid this day personally appeared WILLIAM EISENBEISS, who, being duly sworn, said that the foregoing Affidavit is true to the best of his information, knowledge and belief.

Given under my hand this 14 day of July, 1989.

/s/ Della M. Holiday
Notary Public

My Commission Expires
May 5, 1990

SUPREME COURT OF THE UNITED STATES

No. 92-486

UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY, t/a Power 94

ORDER ALLOWING CERTIORARI

Filed December 14, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

December 14, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 67008

No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
MARK D. STILES
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a ban on commercial speech that is wholly ineffective in promoting a governmental interest when applied to a particular speaker violates the First Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES AND RULES:

TABLE OF AUTHORITIES – Continued

No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This is an as-applied constitutional challenge brought by a traditional First Amendment speaker. The speaker, a radio station, sought to enjoin the application of 18 U.S.C. §§ 1304 and 1307 to its operations on the ground that the statutes infringed its First Amendment rights. The trial of this action produced a detailed, comprehensive, and uncontradicted factual record which proved empirically that, as-applied to respondent, the statutes in question are ineffective in promoting or discouraging lottery participation, in promoting federalism, or in accomplishing

any other governmental purpose. The sole effect of the statutes is to disadvantage one licensee *vis-a-vis* its competitors and prevent it from broadcasting information which inundates the area reached by its signal. Based on this record, both the United States District Court for the Eastern District of Virginia (Kaufman, J.) and the United States Court of Appeals for the Fourth Circuit ruled that application of 18 U.S.C. §§ 1304 and 1307 to respondent was unconstitutional.

This case does not involve the application of 18 U.S.C. §§ 1304 and 1307 generally. The holding is limited to the unique facts presented to the District Court, and the case is *sui generis*. The issue is not the validity of the bright line rule established by the statutes, but whether laws can infringe speech where they accomplish no governmental purpose.

FACTS

An "as-applied" constitutional challenge is judged on the facts and the facts of this case are nothing if not unusual. Edge Broadcasting Company ("Edge") owns WMYK-FM, a 100,000-watt radio station. The station is licensed by the FCC to Elizabeth City, North Carolina and broadcasts from Moyock, North Carolina, a town about three miles south of the North Carolina/Virginia border.[1] (JA 19). WMYK has a dual identification of Elizabeth City

[1] Record citations are made to the Joint Appendix filed with this Court.

and Virginia Beach, Virginia. Its studios and corporate offices are located in Virginia Beach. (JA 19).

Ninety-two and two-tenths percent (92.2%) of the people comprising WMYK's listening audience live in Virginia. Seven and eight-tenths percent (7.8%) live in North Carolina. WMYK's signal reaches nine North Carolina counties but fewer than two percent (2%) of all North Carolinians live in these counties. (JA 26-27). The Commonwealth of Virginia operates a lottery;[2] the State of North Carolina does not.

North Carolina residents who live within WMYK's broadcast area listen to broadcasts of Virginia-based radio stations, view Virginia-based television and read Virginia newspapers. (JA 25-26). Seventy-nine percent (79%) of all radio stations whose broadcast signals reach these counties are licensed in Virginia; approximately sixty-two percent (62%) of all radio listening in these counties[3] is directed to radio stations licensed to Virginia. (JA 26-27).

During a given week in which the Virginia lottery advertises an instant game, for example, the radio stations[4] advertising the lottery air, on the average, 12 lottery advertisements each day and reach, in any given quarter hour of radio, an audience of 4,400 North Carolinians over the age of 18. During a typical advertising

[2] *See Va. Code* § 58.1-4001 (1987), authorizing the Commonwealth to sponsor a lottery.

[3] The counties are Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank and Perquimans. (JA 26).

[4] The stations are: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. (JA 26).

period for one instant game, these Virginia stations aired 452 60-second spots advertising the lottery. This type of advertising will run continuously so long as Virginia has a lottery. (JA 27, 41). In addition, vast numbers of Virginia advertisers include their affiliation with the lottery in their promotional messages.

The residents of this part of North Carolina are also exposed to Virginia lottery advertising on television, the dominant informational media. The four Hampton Roads area television stations which air Virginia lottery advertising enjoy large audiences in the nine-county WMYK service area and beyond.[5] Seventy-five percent of all television viewing in four of these counties is directed to Virginia stations; between 50% and 75% is directed to Virginia stations in three counties; and between 25% and 50% is directed to Virginia stations in two counties. (JA 28-30). With an average of 274 television ads airing during a typical advertising campaign for an instant game, and with lottery news stories broadcast as a matter of course, virtually every North Carolinian living in the part of North Carolina reached by WMYK's signal is exposed to the Virginia lottery. (JA 28).

The North Carolinians residing in WMYK's service area are also supplied with Virginia lottery advertising by the Virginia newspapers which serve the area. These papers carry Virginia lottery advertising and circulate approximately 10,400 newspapers daily, 11,250 on Saturday, and 12,500 on Sundays. (JA 32).

---

[5] These stations are: WAVY, WVEC, WTKR, and WTVZ. (JA 26).

Advertising the Virginia lottery is big business, both for the Virginia Lottery Board and for the many private retailers affiliated with the lottery. Excluding the cost of production, for example, the Lottery Board spent $1,202,905.00 on its introductory advertising campaign. It spent a total of $4,354,199 to introduce its first three instant games. At the time of the trial, it anticipated spending about $2.3 million to introduce its on-line games and about $3 million a year to sustain them. (JA 40-41; 24-25).[6]

Both the Lottery Board and private businesses advertise the lottery extensively in Hampton Roads. The Virginia Lottery Board buys advertising from seven Hampton Roads radio stations, four television stations, and three newspapers. (JA 26, 28, 31). As of the time of trial, there were approximately 1,414 Hampton Roads businesses selling lottery tickets. Many of these outlets trumpet their status as lottery retailers in their advertising. (JA 42; 32).

Like other Americans, North Carolinians have great appetites for television and radio. Television viewers and radio listeners alternate between various stations. The same people who watch television also listen to the radio and read newspapers. (JA 36). In the average American

---

[6] While the Virginia Lottery spends a great deal of money on advertising, the content of its advertisements is informational rather than promotional. Section 58.1-4022(E)(ii) of the Virginia Code prohibits the State from expending any funds "for the primary purpose of inducing persons to participate in the lottery." *Cf.* Va. Code § 58.1-4022(E)(i) (authorizing the expenditure of funds for informational purposes).

household, the television set is turned on for seven hours and eight minutes per day. (JA 30).[7]

Ninety-nine percent of all American households have radios. In these households, the inhabitants have an average of 5.6 radios per household. Sixty-one percent (61%) of all adults have radios at work and listen to the radio fifty-three percent (53%) of the time. Ninety-five percent (95%) of all automobiles have radios, and seventy-seven percent (77%) of all adults are reached every week by car radio. (JA 31). Ninety-six and one-tenth percent (96.1%) of all American men and ninety-five and seven-tenths percent (95.7%) of all American women over the age of 18 listen to the radio during any given week.[8]

The impact of sections 1304 and 1307 on WMYK was severe. WMYK did not broadcast any Virginia lottery information at all because it feared that it would be prosecuted or subjected to administrative penalties. (JA 55-56). It refrained from airing any lottery press releases and any stories containing data on the why, how, when and where of the Virginia lottery because it could not predict what was permissible and what was not. (JA 55-58).

---

[7] Men watch television on the average of four hours and 14 minutes a day; women, an average of five hours and 12 minutes a day; teenagers, between the ages of 12 and 17, watch an average of three hours and eight minutes a day; and children, between the ages of 2 and 11, watch an average of 3 hours and 40 minutes a day. (JA 30).

[8] American men listen an average of 2.55 hours every day; American women listen an average of 2.53 hours a day. All Americans over the age of 12 listen to the radio for an average of three hours a day. (JA 31).

Of the 999 enterprises advertising on WMYK as of May 26, 1989, only 17 were located in North Carolina. Since only .017% of WMYK's advertisers live in North Carolina, its economic existence hinges on its ability to attract Virginia advertisers. Sections 1304 and 1307 prevented WMYK from carrying advertisements for Virginia businesses wishing to advertise their affiliation with the Virginia lottery. (JA 59). WMYK, therefore, lost advertisers who wanted to include a reference to their affiliation with the Virginia lottery. (JA 52-53). Radio ads are generally prepared and taped in advance, and many WMYK advertisers would not alter their advertising copy to delete lottery related messages. (JA 51-54). WMYK had to refuse to broadcast such ads.

The government's ban on WMYK did not reduce the number of lottery ads broadcast. Advertising budgets are fixed. The advertiser apportions the budget among various competitors. When WMYK was not able to accept advertisements, the advertising simply went to another broadcaster. WMYK's competitors were free to broadcast that which WMYK was prohibited from transmitting, and they did so. WMYK's enforced silence did not diminish either the volume or effectiveness of lottery advertisements.

SUMMARY OF ARGUMENT

The issue in this case is whether statutes prohibiting speech pass constitutional muster even though, as applied, they advance no governmental objective. The issue is not whether 18 U.S.C. §§ 1304 and 1307 are

invalid; these statutes have not been found to be facially invalid and are enforced throughout the United States. Whether those statutes can be applied to prevent one broadcaster from broadcasting information which is regularly transmitted by all its similarly situated competitors and which inundates the area reached by its signal is a different issue from facial invalidity.

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Court held that to be constitutional a statute prohibiting commercial speech must be effective in directly advancing a substantial governmental interest. In *Board of Trustees v. Fox*, 492 U.S. 469, 484-85 (1989), the Court held that an as-applied, empirically grounded challenge to a statute prohibiting commercial speech was not only appropriate, but the preferred method to test the constitutionality of such a statute. The District Court carefully followed the holdings of these cases, examined the uncontradicted evidence and reached the only conclusion supported by the record, *i.e.*, the statutes did not effectively advance any substantial governmental interest and were, therefore, unconstitutional as applied. *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633 (E.D. Va. 1990). The United States Court of Appeals for the Fourth Circuit reviewed the same overwhelming factual record and affirmed. *Edge Broadcasting Co. v. United States*, reprinted in Pet. App. 1a - 9a. Both lower courts were correct.

A statute which silences one speaker out of many is unconstitutional if it directly advances no governmental interest whatsoever. What would have been surprising is a holding that even though the statutes were demonstrated empirically to be ineffective, they could still be

applied. What is even more surprising is the government's attempt to enforce the statutes where enforcement promotes no governmental interest.

There is a fundamental difference between the power to regulate and the ability to use that power ineffectively and arbitrarily. That the government has the power to regulate lottery advertising does not mean it can enact regulations which simultaneously infringe constitutional rights and fail to advance governmental objectives. If all broadcasting signals from every station reached the entire United States, no one would seriously suggest that Congress could legislatively prohibit broadcasters located in the 17 nonlottery states from broadcasting lottery advertisements. Even if Congress has the power to regulate gambling advertising, this does not mean that Congress has the power to prevent one similarly situated broadcaster from broadcasting that which all others are broadcasting. The requirement that legislation infringing on constitutional rights must be effective in advancing governmental goals in order to be constitutional is neither surprising nor revolutionary. This case is governed by *Central Hudson* and *Fox*, and the lower courts correctly applied those holdings to the facts proven at trial.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS RESPONDENT'S RIGHT TO SPEAK.

Petitioners initially ask this Court to deprive certain commercial speech of any constitutional protection. While their request arises in the context of speech about

gambling, it is not limited to this activity alone. The test petitioners urge would allow Congress to restrict commercial speech about any conduct Congress *could* prohibit. It would not matter that Congress declined to exercise its power of prohibition. The mere fact that it has the power to ban would be enough to deprive commercial speech about the disfavored topic of any constitutional protection.

Since Congress can prohibit virtually any conduct except as specifically proscribed by the Constitution, *United States v. Darby*, 312 U.S. 100, 114 (1941), the test that petitioners propose is breathtaking in scope. It would require not only the overruling of *Central Hudson*, but also repudiation of the fundamental constitutional tenant that society is best served by giving its citizens the information necessary to make informed choices.

A. Development of Commercial Speech Protection.

The First Amendment protection accorded commercial speech effectively began in 1975 with *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Court overturned on First Amendment grounds the conviction of the editor of a newspaper for publishing in Virginia an advertisement for an abortion referral agency in New York. After reviewing its earlier decisions, the Court stated that they do " . . . not support any sweeping proposition that advertising is unprotected *per se*." *Id.* at 820.

In *Virginia State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a statute forbidding licensed pharmacists from engaging in price

advertising for prescription drugs was struck down on First Amendment grounds. Even though the Virginia statute was not irrational in assuming that price advertising might affect professionalism, the Court invalidated the statute and said: "[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), a municipal ordinance which, for the purpose of preventing white flight, forbade the posting of "For Sale" or "Sold" signs on residential property was unanimously struck down. Even though it was rational for a legislature to conclude that a profusion of "For Sale" signs would indicate and perhaps exacerbate white flight, the Court again invalidated the ordinance and repeated *Virginia State Board*'s admonition that, "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 97. In *Carey v. Population Services International*, 431 U.S. 678 (1977), a statute prohibiting any "advertisement or display" of contraceptives was held invalid.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), synthesized prior commercial speech rulings. The "four-step analysis" necessary in a commercial speech case was articulated as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected

> by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id. at 566.

While the scrutiny applied to commercial speech is not as searing as that applied to political speech, laws restricting commercial speech are subject to "searching scrutiny." *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (analysis of content of commercial communications is "intermediate level of scrutiny"). Consumers' interest in the free flow of commercial information may be as keen, if not keener, than their interest in the day's most urgent political debate. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). As a result, the government carries the burden of justifying any restriction on commercial speech. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983).

B. The Power to Regulate Commercial Speech Does Not Include the Power to Regulate Arbitrarily or Ineffectively.

Nothing in the decisions cited above suggests that this Court has adopted a sliding scale of constitutional protection. So long as *Central Hudson*'s threshold test was satisfied, speech about previously illegal conduct, *e.g.*, *Bigelow v. Virginia*, 421 U.S. 809 (1975), was afforded the same protection as speech about price and item advertising, *e.g.*, *Virginia State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As Justice White explained in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985):

> Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted *only* in the service of a substantial governmental interest, and *only* through means that directly advance that interest.

Id. at 638 (emphasis added).[9]

---

[9] As petitioners concede (Pet. Brief at 18), the commercial speech cases decided since 1975 have changed the law since the days of *Ex parte Jackson*, 96 U.S. 727 (1877) and *In re Rapier*, 143 U.S. 110 (1892). The effect of these changes on 18 U.S.C. §§ 1304 and 1307 was noted by the former Chairman of the Federal Communications Commission in testimony about amendments to those statutes. Dennis R. Patrick stated that sections 1304 and 1307 "may be constitutionally infirm given the increased recognition of First Amendment protection accorded commercial speech since the lottery provision was originally enacted. . . ." *See* House Report accompanying HR 3416, 100th Cong. 2d Sess. (March 31, 1988) (letter of Dennis R. Patrick dated November 3, 1987).

Petitioners' proposal to deprive commercial speech about gambling of any constitutional protection is based primarily on Chief Justice Rehnquist's observation in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), that it would be:

> a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Id. at 346. From this dicta, petitioners argue that the government can sustain any prohibition on gambling advertising without regard to whether the regulation is arbitrary or effective. Since the government has the power to ban gambling advertising, petitioners argue it must have the power to enact lesser regulation without regard to effectiveness, *i.e.*, the power to ban gambling advertising includes the right to be arbitrary or ineffective when enacting anything less than a total ban. There is not a shred of support in *Posadas*, even in dicta, for this revolutionary notion. The Court has never held that the government is free to arbitrarily or ineffectively infringe speech rights simply because of the subject matter of the speech. The power to regulate and how that power may be implemented consistent with the Constitution are very different issues.

In *Posadas*, the Court rejected a *facial* challenge to a Puerto Rican law prohibiting casino gambling advertising directed at Puerto Ricans but not tourists. Because the challenge was facial, there was no empirical data in the

record concerning the effectiveness of the statute. Considering Puerto Rico's island geography and isolated locale, the narrowing construction placed on the law by the Puerto Rico Superior Court, and the rational basis for the conclusion made by the legislature, the Court refused to hold that the ban on advertising could *never* further the government's interest. Significantly, the Court in *Posadas* did not abandon *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). It instead cited *Central Hudson* as the controlling authority. 478 U.S. at 340. If the petitioners in *Posadas* had proved empirically that the statute was completely ineffective, the statute would not have been sustained.

There is nothing in *Posadas* which even suggests the government is authorized to use the power to ban speech arbitrarily or ineffectively. While petitioners argue that *Posadas* stands for the proposition that the power to regulate includes the power to promulgate any regulation if it can be rationalized without regard to empirical effect, *Posadas* does not support this proposition. Historically, statutes have been tested on the basis of how they operate in the real world and not on the basis of how they can be conceptualized. In *Posadas* the Court did not substitute ratiocination for fact finding, and there is no basis for such a substitution.

Under the scenario suggested by petitioners, the government would have the authority to permit every casino except one from advertising on the ground that banning

advertising from one casino would reduce the total amount of advertising, which in turn might reduce demand for gambling. The ban would be constitutional even if it were proved that silencing the one casino accomplished nothing. This would be an absurd result.

No one would deny the government's appetite for absolute power, nor its ingenuity in rationalizing its need for the absolute power it craves. One can rationally justify much that is empirically nonsensical. Substituting ratiocination for empirical examination of actual evidence would exponentially expand the government's power and simultaneously decrease the rights of citizens. This Court has not yet taken that step, and this case does not justify the adoption of the radical new jurisprudence urged by petitioners.

II. THE ADVERTISING BAN DOES NOT DIRECTLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST WHEN APPLIED TO RESPONDENT.

An "as-applied" challenge must necessarily be judged on the evidence introduced at trial. Although the government bears the burden of justifying a restriction on commercial speech, *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983), petitioners did not introduce any evidence proving or tending to prove that sections 1304 and 1307 directly advance a governmental interest when applied to respondent. The extensive evidence that respondent introduced demonstrating the ineffectiveness of these statutes was either stipulated or uncontroverted.

It is, of course, understandable why petitioners attempt to ignore the facts. The goal of an advertiser is to saturate a community with its message. Once the community is saturated, the advertiser has achieved its goal. How saturation is achieved is irrelevant. The advertiser cares that the message is disseminated and reaches the public and has no interest as to how or on what station the message is transmitted. If an area is already saturated with a message, it is irrelevant how saturation occurs, and preventing one speaker from carrying advertising accomplishes nothing.

Based on the record developed at trial, the United States Court of Appeals for the Fourth Circuit affirmed the district court's finding of unconstitutionality. The Fourth Circuit stated:

> Under the unique circumstances of this case, the government's goal to preserve state lottery policies is not advanced by precluding Power 94 from broadcasting Virginia lottery advertisements. Approximately 127,000 North Carolina residents are within Power 94's broadcast range. These listeners, who comprise less than 2% of North Carolina's total population, receive most of their radio, newspaper and television communications, from Virginia-based media. The North Carolina residents who might listen to Power 94 are inundated with Virginia's lottery advertisements. Simply put, the North Carolina residents which the statutes purport to protect already are exposed to numerous Virginia Lottery advertisements through telecast, broadcast and print media. Prohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina residents from lottery

> information. This ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech.

(Pet. App. 6a - 7a).

Confronted with a record that overwhelmingly proves the statutes' ineffectiveness when applied to respondent, petitioners seek to change a fundamental tenant of constitutional jurisprudence. They decry empiricism – particularly when a statute is applied to an individual plaintiff. In petitioners' brave new world, evidence is eschewed and findings of fact are irrelevant. Petitioners argue that constitutional challenges to bans on commercial speech should turn on broad theories justifying the law's enactment rather than admissible evidence of its actual operation. The law established by this Court holds otherwise.

A. "As-Applied" Challenges Are The Preferred Method Of Testing A Statute's Constitutionality.

None of petitioners' arguments is more novel than the contention that commercial speech restrictions should not be judged on a case-by-case basis. (Pet. Brief at 33-37). This argument, if accepted, would eradicate years of precedent encouraging "as-applied" constitutional challenges.

1. The history of "as-applied" constitutional challenges.

As early as 1885, the Court expressed a preference for as-applied rather than facial constitutional challenges. In

Liverpool, etc. Steamship Co. v. Comrs. of Emigration, 113 U.S. 33 (1885), the Court said:

> In the exercise of [constitutional] jurisdiction, [this court] is bound by two rules, to which it has *rigidly* adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, *never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.*

Id. at 39 (emphasis added); *accord, Trade-Mark Cases*, 100 U.S. 82, 96 (1879). In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (dissenting opinion), Justice Brandeis recognized the as-applied doctrine as one of a family of rules which the Court imposes upon itself to limit its exercise of the power to decide the constitutionality of statutes. Among the seven rules is the rule that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 346-48 (citations omitted).

As-applied adjudication rests upon the time-tested advisability of having concrete, rather than hypothetical, cases. Justice White recently observed, "as a general proposition, we can arrive at informed judgments only when we have a record showing the actual impact of the challenged statute." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 776 n.4 (1988) (White, J., joined by Stevens and O'Connor, J.J., dissenting). As-applied adjudication also enables the judiciary to avoid confrontations with Congress by deciding no more than necessary to dispose of a specific case. *Id.* This is the preferred

approach "since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 447 (1985).

Petitioners' contention that sections 1304 and 1307 should be upheld if they advance Congress's interests at a national level without regard to how they affect an individual plaintiff offends the well-established principle that a generally valid statute may be unconstitutional as it applies to particular litigants. For example, in *Cantwell v. Conn.*, 310 U.S. 296 (1940), the Court did not invalidate the state statute defining a "breach of the peace" on its face but only to the extent that it was construed and applied to prevent the peaceful distribution of religious literature on the streets. Similarly, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court invalidated the state's rules against solicitation by attorneys only as those rules were sought to be applied to the activities of the NAACP involved in that specific case. *See also United States v. Grace*, 461 U.S. 171 (1983); *Boddie v. Conn.*, 401 U.S. 371 (1971); *Marsh v. Alabama*, 326 U.S. 501 (1946). These cases stand for the proposition that even though statutes are in most cases constitutional and effective in promoting legitimate governmental aims, the Court does not ignore or condone applications which are proved to be unconstitutional.

2. "As-applied" challenges to restrictions on speech.

This Court has expressly and repeatedly recognized the validity of "as-applied" challenges to restrictions on

speech. As Justice Stevens observed in *Members of City Council v. Taxpayers For Vincent*:

> The fact that the ordinance is capable of valid applications does not necessarily mean that it is valid as applied to these litigants. We may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.

466 U.S. 789, 803 n.22 (1984) (citations omitted). Five years later, the Court reiterated that a facially valid restriction on commercial speech might nonetheless violate the first amendment when applied to the plaintiff. In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), Justice Scalia explained the differences between an as-applied and an overbreadth challenge:

> In addition to being clear about the difference between commercial and non-commercial speech, it is also important to be clear about the difference between an as-applied and an overbreadth challenge. Quite obviously, the rule employed in an as-applied analysis that a statute regulating commercial speech must be 'narrowly tailored,' which we discussed in the previous portion of this opinion, prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: the person invoking the commercial speech narrow-tailoring rule asserts that *the acts of his that are the subject of the litigation* fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 462, . . . he 'attacks the validity of [the statute] not facially, but as applied to his acts of solicitation,' 436 U.S. at 462, . . . whereas the person

> invoking overbreadth 'may challenge the statute that infringes protected speech even if the statute constitutionally might be applied to him.' *Id.* at 462 n.20.

Board of Trustees at 482-83. Justice Scalia thus confirmed the propriety of a challenge "as applied to [the challenger's] acts of solicitation" or any other commercial speech. *Id.*

In giving *Board of Trustees'* respondents the conditional right to maintain their overbreadth challenge, the Court carefully noted the preferred place of as-applied analysis in adjudicating commercial speech cases. Justice Scalia cautioned:

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily – that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not only as an absolute matter, but 'judged in relation to the statute's plainly legitimate sweep,' *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the

> lawfulness of the particular application of the law should ordinarily be decided first.

Id. at 484-85; *see also Peel v. Attorney Registration and Discipline Commission*, 496 U.S. 91, 107 n.15 (1990).

B. The Direct Advancement Test Requires Empirical Proof Rather Than Logical Postulations.

That a governmental body may have a legitimate interest in restricting speech does not automatically render the restriction constitutional. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). The Court must review evidence of the statute's actual operation in order to determine its constitutionality. *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 803 n.22 (1984).

Petitioners argue that *Central Hudson*'s direct advancement test does not require empirical proof. Petitioners urge that a "common sense" link between the restraint imposed and the policies sought to be advanced is sufficient to pass constitutional muster. (Pet. Brief at 40). The commercial speech cases decided both before and after *Central Hudson* squarely refute this contention.

The four-part *Central Hudson* test is the synthesis of a number of prior commercial speech decisions, including *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977). *Linmark* held that an ordinance banning "For Sale" signs violated the First Amendment because the City did not prove that the law was needed to assure integration

in housing. The evidence did not support the City's fears that white residents were "panic selling" or its contention that removing signs would decrease public awareness of home sales and end "white flight." Even though it was not irrational to conclude that "For Sale" signs would increase panic selling, the evidence introduced at trial did not prove the claim. *Id.* at 95. The Court distinguished a decision upholding a ban on "For Sale" signs on the ground that the evidence in that case proved a causal link. *Id.* at 95 n.9.

With *Linmark* as background, the *Central Hudson* majority wrote that a restriction on commercial speech does not directly advance a governmental interest "if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. It is only logical to conclude that empirical evidence is necessary to make this determination. The correctness of such an interpretation was confirmed by the Court's subsequent decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The Court rejected the government's postulation that a ban on the mailing of contraceptive advertising advanced the goal of aiding parents' supervision of their children's birth control education. The record showed that parents largely controlled the receipt of household mail and that children were exposed to significant external information about birth control. Because the statute offered "only the most limited incremental support for the interest asserted," it violated the First Amendment. *Id.* at 73.[10]

[10] Even petitioners concede that the *Bolger* court reviewed the record for evidence of the statute's effectiveness. (Pet. Brief at 40 n.19).

If there were still any legitimate question about whether empirical evidence is necessary to satisfy the direct advancement test, it was laid to rest by the Court's decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The Court considered application of a university ban forbidding a company from holding Tupperware parties in dorm rooms. The Court of Appeals had reversed and remanded the district court's judgment, concluding that it was unclear if the ban directly advanced the state's interest and whether, if it did, it was the least restrictive means to achieving the state's end. The Court of Appeals directed the district court to make "appropriate findings on these points." *Id.* at 473. The Supreme Court clarified the fourth prong of the *Central Hudson* test[11] and remanded the case for a proper as-applied analysis.

In remanding for an as-applied determination as to the validity of the laws' application to both commercial and noncommercial speech, the Court said:

> We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial *and* noncommercial speech that is the subject of the complaint; and, if its application to speech *in either such category* is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

[11] The Court held that governmental restrictions on speech need not be the absolute least restrictive means to achieve the end. *Board of Trustees v. Fox*, 492 U.S. at 477.

Id. at 486 (emphasis added). It is clear that the remand applied to both the third and fourth *Central Hudson* prongs.

Thus, the Court specifically directed lower courts to undertake the type of analysis the District Court performed in this case. In speaking of the latter two prongs of the *Central Hudson* test, the Court said: "[W]e must determine whether the regulation directly advances the governmental interests asserted, and whether it is not more extensive than necessary to serve that interest." *Id.* at 475. It is clear that the remand directed that factual findings were to be made. The Court said:

> The Court of Appeals did not decide, however, whether [the law] directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think the remand was correct since further *factual findings* had to be made.

Id. at 475-76 (emphasis added).

If all that was required was a rational evaluation of the alleged justification for the ban, the Court would not have directed the district court to make factual determinations, on an as-applied basis, concerning both the third and fourth prongs of the *Central Hudson* test. The Court specifically identified the governmental interests allegedly involved, the specific regulations, and directed that the factual determinations be made in that specific factual context. In the instant case, the courts below followed this Court's directive precisely.

C. The Record Is Devoid Of Evidence Establishing That Sections 1304 And 1307, As Applied To Respondent, Directly Advance Any Governmental Interest.

In ruling that Sections 1304 and 1307 could not be applied to prohibit WMYK from advertising the Virginia lottery, the District Court reviewed the evidence and found that the laws did nothing to advance either Congress's or North Carolina's interests. It based this conclusion on the proven fact that the North Carolinians in WMYK's broadcast area are saturated with lottery information and advertising from Virginia media. *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 639-641 (E.D. Va. 1990).

Petitioners argue that the courts below failed to recognize that sections 1304 and 1307 are designed to serve not one interest, but two. Those interests are discouraging lottery participation in states that do not sponsor lotteries *and* accommodating lottery participation and promotion in states that do. (Pet. Brief at 31-33). Petitioners argue that the courts below ignored the latter legislative goal.

The District Court considered this same argument and rightly concluded that the goals of the federal laws are at most only implicated with respect to the 8% of WMYK's listeners who live in the nine North Carolina counties reached by its signal. *Edge*, 732 F. Supp. at 640. Silencing WMYK could in no way further Virginia's desire to promote its lottery. The sole question thus was whether forbidding WMYK from advertising the Virginia lottery prevented residents of North Carolina from being

exposed to Virginia lottery advertising. It did not. The District Court found:

> Application of Section 1304 to Edge can only speculatively advance the goals of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of 'remote' support rejected in *Central Hudson* as not 'directly advanc[ing]' either interests of federalism or limitations on lottery sales.

Id. Petitioners were entitled to offer evidence of the statutes' effectiveness, but were unable to do so.

Petitioners also argue that *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) allows Congress to favor one source of commercial speech over another without running afoul of *Central Hudson*'s direct advancement test. (Pet. Brief at 32-33). This case simply stands for the proposition that it is permissible to distinguish between offsite billboard advertising and onsite billboard advertising when evaluating a *facial* challenge to an ordinance. The holding has no application here. First, the difference between offsite and onsite billboard advertising is obvious. Onsite advertising is site specific. Offsite advertising is virtually unlimited. It is axiomatic that limiting billboard advertising to specific sites would be effective in promoting governmental interests. Furthermore, *Metromedia* involved a facial rather than an as-applied challenge. The empirical evidence submitted in this case was not present in *Metromedia*.

D. Congress May Not Constitutionally Silence One Speaker Among Many.

Petitioners' final attempt to gut *Central Hudson* of any meaning masquerades as an argument about logical inconsistency. Petitioners begin with the premise that Congress could lawfully ban any commercial speech regarding lotteries. Petitioners then reason that if a total ban is constitutional, any partial ban must also be upheld. (Pet. Brief at 37).

Assuming, *arguendo*, that Congress could ban all speech about a lawful activity, it does not follow that Congress may deprive selected persons of their right to free speech without accomplishing anything. If the law does not directly advance a legitimate governmental interest, it is nothing more than a naked abuse of power. This is the very point of *Central Hudson*'s direct advancement test. The Constitution does not allow the government to decide arbitrarily who may and may not utter the same words to the same audience.

In *Virginia Board of Pharmacy*, 425 U.S. 748 (1976), the Court recognized that commercial businesses have a First Amendment right to speak. *Id.* at 756. This is a personal right which attaches irrespective of whether the same information is available from other sources.

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

Id. at 757 n.15. The First Amendment forbids quantifying and suppressing speech based on the notion that "enough is enough."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
MARK D. STILES
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500

Attorneys for Respondent
Edge Broadcasting Company

February 1993

No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
T/A POWER 94

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RENEE LICHT
Acting General Counsel
Federal Communications
Commission
Washington, D.C. 20544

TABLE OF AUTHORITIES

Cases: Page

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-486

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
T/A POWER 94

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. a. Respondent and amici claim that *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986), does not support our argument that Congress should be allowed to restrict lottery advertising by virtue of its power to ban lotteries altogether. Resp. Br. 14-16; National Ass'n of Broadcasters *et al.* (NAB) Amicus Br. 16-20; Association of National Advertisers *et al.* (ANA) Amicus Br. 11-17. In fact, *Posadas* makes that precise point. In the course of rejecting the claim that Puerto Rico's restrictions on advertising casino gambling were unconstitutional

under *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), and *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977), this Court in *Posadas* expressly concluded that "[i]n our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-346. The Court elaborated on that point as follows, *id.* at 346-347 (citations and footnote omitted):

> Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of ~~those who~~ would profit from such increased demand. Legislative

> regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand to legalization of the product or activity with restrictions on stimulation of its demand on the other hand. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.[1]

Moreover, the dissenters in *Posadas* specifically criticized the majority for endorsing a "greater includes the lesser" rationale.[2] And this Court summarized *Posadas* two Terms later, stating: "In *Posadas* the Court concluded that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'" *Meyer* v. *Grant*, 486 U.S. 414, 424

---

[1] Respondent dismisses this Court's statements as "dicta" because they were made after this Court had concluded that Puerto Rico's restrictions satisfied the *Central Hudson* test. Resp. Br. 14. But the Court plainly understood the respondent in *Posadas* to be arguing that the restrictions at issue were in any event constitutionally defective under *Carey* and *Bigelow*. See 478 U.S. at 345-346. The Court's statements were made in the course of rejecting that argument.

[2] 478 U.S. at 354 n.4 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) ("The Court reasons that because Puerto Rico could legitimately decide to prohibit casino gambling entirely, it may also take the 'less intrusive step' of legalizing casino gambling but restricting speech.") (quoting *Posadas*, 478 U.S. at 346); *id.* at 359 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting) ("The Court concludes that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'") (quoting *Posadas*, 478 U.S. at 345-346).

(1988) (quoting *Posadas*, 478 U.S. at 345-346). In sum, in *Posadas* the Court clearly adopted the "greater includes the lesser" rationale that we have urged in this case.[3]

The conclusion that Congress may restrict advertising related to lotteries is fully consistent with settled First Amendment doctrine. Historically, government could outlaw commercial speech (*i.e.*, speech proposing a commercial transaction) without violating the First Amendment.[4] Since 1976, commercial speech has received constitutional protection.[5] But this Court has made clear, before and after 1976, that government may completely ban advertising of illegal goods or services.[6] The reason is the govern-

[3] Amicus ANA contends that the "greater includes the lesser" rationale of *Posadas* does not apply here because Congress lacks the authority to outlaw state-run lotteries. ANA Br. 9-11. There is no merit to that claim. Congress clearly has the power to outlaw lotteries that affect interstate commerce. See, *e.g.*, *Champion* v. *Ames (No. 2)* (*Lottery Case*), 188 U.S. 321 (1903). Pet. Br. 25-26. The Tenth Amendment adds nothing to ANA's claim. See *South Carolina* v. *Baker*, 485 U.S. 505 (1988); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Compare *New York* v. *United States*, 112 S. Ct. 2408 (1992). Even under the more stringent Tenth Amendment test applied in *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), running a lottery is not a "traditional governmental function[]" and therefore is not immune from federal regulation.

[4] See *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

[5] See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[6] *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."); see also, *e.g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980); see *Lynch* v. *Blount*, 404 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court); *Outpost Dev. Corp.* v. *United States*, 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (three-judge court); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904).

ment has a compelling interest in the prosecution of its criminal laws. See, *e.g.*, *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.") (quoting *DeVeau* v. *Braisted*, 363 U.S. 144, 155 (1960)).

It is therefore clear that Congress and the States can outlaw gambling and advertising of illegal lotteries, as they have done for most of our history. Pet. Br. 4-9. Since Congress and the States can outlaw gambling and related advertising entirely, then it makes little sense to say they cannot engage in the lesser form of regulation at issue in this case. After all, outlawing activities such as gambling imposes considerable costs on society as well as lawbreakers. One cost is the birth of a black market for contraband goods and services (witness the emergence during Prohibition of organized crime) and the related costs that, unfortunately, all too often are associated with under-the-counter sales of contraband: corruption of law enforcement officials (to secure and maintain operating rights), and the commission of still further crimes (to ensure payment by customers, to maintain discipline within the

organization, and to prevent competition from the outside). The upshot is that enforcing vice laws can be so dear that society resorts to what Professor Epstein has aptly termed "damage control": legalization and regulation of disfavored activities, including restrictions on advertising. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65 (1988).[7] Because activities like gambling are often legalized only as an accommodation to necessity, for First Amendment purposes lawful gambling should not be treated differently from its illegal cousin.

In addition, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). Accordingly, a restriction on commercial speech imposes costs on First Amendment values that are considerably less than those imposed by similar restrictions on political debate. As a result, just as society has long been free to ban the advertising of illegal activities, so, too, should it be able to forbid or restrict advertising of related vices, like gambling.

Respondent and amici maintain that our submission is a novel one, but it is they who seek to alter settled law. The principle that government can ban advertising of gambling is hardly novel. On the con-

[7] See, *e.g.*, 15 U.S.C. 1335 ("After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."); see generally *Posadas*, 478 U.S. at 346-347 & n.10 (collecting other similar examples).

trary, this Court endorsed that principle more than a century ago, *Ex parte Jackson*, 96 U.S. 727 (1878); *In re Rapier*, 143 U.S. 110 (1892); we have accepted it throughout our history, Pet. Br. 4-9; and the Court recently reaffirmed it in *Posadas*. In fact, the argument advanced by respondent and amici would effectively require this Court to overrule *Ex parte Jackson*, *In re Rapier*, and *Posadas* even though neither respondent nor amici have asked the Court to do so.[8]

Respondent and amici contend that we are asking this Court to jettison all First Amendment protection for commercial speech by holding that the legislature may forbid advertising about any item that may theoretically be outlawed. Resp. Br. 9-16; NAB Br. 5-8, 22-26; ANA Br. 11-18. They are wrong. Our submission is narrow and simple: Just as government can prohibit advertising of illegal activities, such as the sale of controlled substances, so, too, can government ban or restrict advertising of closely related products and activities, such as cigarettes, alcohol, prostitution, and gambling, that society may conclude are immoral or harmful, but sometimes chooses to legalize and regulate. Only that limited category of activities would be subject to the rule we have urged the Court to adopt. Respondent's and amici's apocalyptic cry that acceptance of our argument

[8] Amicus NAB claims that advertisements about the Virginia lottery could assist North Carolinians in deciding whether to adopt a North Carolina state lottery. NAB Br. 7. That argument proves too much, because it would deny government the ability to impose restrictions on the advertising of any product, even illegal ones such as cocaine or heroin, simply because such ads might have some bearing on the possible legalization of that item.

spells doom for the commercial speech doctrine is therefore overblown.

b. Since under *Posadas* Congress may restrict lottery advertising, the remaining question is whether the particular rules that Congress enacted by means of 18 U.S.C. 1304 and 1307 are rational. Contrary to respondent's claim, Resp. Br. 13-16, they surely are. Congress has chosen to ban advertising of lotteries in States that do not sponsor lotteries in order to support the belief held by those States that the public demand for gambling should be reduced. *Posadas* held that the government's interests in reducing public demand for gambling (of which lotteries are a form, Pet. Br. 22-23) is legitimate, and that restrictions on gambling advertising are rationally related to that interest. 478 U.S. at 341-342, 345 n.9; see also *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity.").[9] Congress also has created

[9] Respondent concedes that 18 U.S.C. 1304 and 1307 serve legitimate interests. Nevertheless, amicus ANA claims that the only interest North Carolina has is in preventing its residents from traveling to Virginia to buy lottery tickets, and that *Bigelow* v. *Virginia*, *supra*, held that a State lacks a legitimate interest in barring residents from traveling to another State to conduct activity that is lawful within the latter State. ANA Br. 4-9, 18-19. It is not clear that that issue is properly before the Court, since amici cannot present additional questions not raised by the parties. *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979). In any event, ANA's argument lacks merit, for several reasons.

To begin with, ANA errs in relying on *Bigelow*. This Court distinguished *Bigelow* in *Posadas* on the ground that in *Bigelow* "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State." 478 U.S. at 345. By contrast, gambling is not a constitutionally protected activity. Pet. Br. 23; *Posadas*, 478 U.S. at 345. In addition, North Carolina could reasonably believe that the conduct of its citizens in participating in the Virginia Lottery could have harmful consequences at home in North Carolina. North Carolina could reasonably find that gambling has a "corrosive effect * * * on family and business obligations," Epstein, 102 Harv. L. Rev. at 65; that it can impoverish residents, perhaps even bankrupting the most needy; and that it can burden residents who do not gamble, but who must pay the taxes necessary to support residents who may be impoverished by spending all their resources on games of chance. In sum, North Carolina could reasonably believe that even out-of-state gambling by its residents has harmful effects in North Carolina. Finally, Congress can regulate the private use of the facilities of interstate commerce facilities to help States enforce their policies. See *Public Clearing House* v. *Coyne*, 194 U.S. at 507; *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737.

an exception for stations licensed to a State with a state-operated lottery in order to accommodate the interests of those States. That is plainly legitimate. Furthermore, the means that Congress has chosen to achieve its dual ends—*i.e.*, using a geographic classification that draws a distinction based on whether the State to which a broadcaster is licensed runs a lottery—is a rational way to accommodate the States' differing interests. Accordingly, since the ends of this scheme are legitimate, and the means to achieve those ends are not arbitrary, the congressional scheme is constitutional.

2. a. Respondent argues that 18 U.S.C. 1304 and 1307 are unconstitutional because they do not "directly advance" Congress's goals under *Central Hudson*. More specifically, respondent contends that be-

cause "the North Carolinians in WMKY's broadcast area are saturated with lottery information and advertising from Virginia media," the advertising restrictions imposed by 18 U.S.C. 1304 and 1307 are futile as applied to WMYK. Resp. Br. 27; NAB Br. 11-15; ANA Br. 19-20. That argument is flawed in several respects.

First, respondent has ignored the fact that Congress had competing goals in mind. Congress enacted the exemption in 18 U.S.C. 1307 in order "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States," S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974), by "making a reasonable balance between Federal and State interests in this area," including "the consideration and protection of the policies and the interests of the States which do not provide for such lotteries," H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974). Any effort to advance Virginia's interest in promoting the Virginia Lottery to North Carolina residents adversely affects North Carolina's interest in discouraging such promotion.[10]

---

[10] For that reason, it is apparent that what respondent ultimately is challenging is not the efficacy of this scheme. Respondent's submission instead is that Congress lacks power under the First Amendment to advance competing State interests in one regulatory scheme. But that claim bears on the first prong of the *Central Hudson* test (*i.e.*, whether the government's interests are "substantial"), and not on the prong at issue here (*i.e.*, whether the regulation "directly advances" those interests). Equally important, nothing in the Court's decisions would support the argument that Congress cannot strive simultaneously to advance the interests of the States that do and do not sponsor state lotteries. Indeed, respondent makes no such argument.

Second, respondent mistakenly assumes that Congress's goal was to keep North Carolinians within WMYK's broadcast radius ignorant of the Virginia Lottery, and maintains that, because 18 U.S.C. 1304 and 1307 do not (and perhaps cannot) achieve that goal, those laws do not "directly advance" Congress's end. But Congress did not adopt those laws to keep North Carolina residents ignorant of the Virginia Lottery for ignorance's sake. Instead, Congress sought to accommodate the competing interests of the States in discouraging and encouraging *public participation in state-run lotteries.* Thus, the relevant question is not whether 18 U.S.C. 1304 and 1307 keep WMYK's listeners ignorant about the Virginia Lottery; it is whether those statutes help reduce the public demand for gambling by North Carolinans. The evidence cited by respondent does not, to paraphrase *Posadas*, undermine the "reasonable" belief that "advertising of lottery gambling aimed at residents of North Carolina would serve to increase the demand for the product advertised." 478 U.S. at 342.

Third, respondent misunderstands how the "directly advance[s]" test should be applied. We do not argue that respondent should not be free to mount an as-applied challenge to 18 U.S.C. 1304 and 1307 under the First Amendment. We just disagree with respondent about how an as-applied challenge must be conducted. *Posadas* concluded that the "directly advances" prong of the *Central Hudson* standard (together with the requirement that a regulation be "no more extensive than necessary") "basically involve a consideration of the 'fit' between the legislatures' ends and the means chosen to accomplish those ends." 478 U.S. at 341. It therefore is reasonable to

refer to equal protection doctrine for guidance in performing the proper analysis, as we explained in our opening brief (at 35-36), since equal protection analysis also involves scrutiny of "means" and "ends." When considered in that manner, 18 U.S.C. 1304 and 1307 are constitutional. This program fits together nicely. It reduces the amount of lottery advertising received by citizens of non-lottery States and thereby serves the interest of those States in reducing demand for lottery tickets by their citizens, while also permitting advertising of state-run lotteries in States that sponsor them, thereby serving the interest of those States in encouraging people to buy their lottery tickets.

To be sure, in one sense this scheme may be underinclusive since it does not prevent all Virginia Lottery advertising from reaching North Carolina residents. But that is due to the laws of physics, not man, since broadcast signals cross state lines. In any event, an underinclusive scheme is not unconstitutional, as this Court concluded in *Posadas*, 478 U.S. at 342, and *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion of White, J.); *id.* at 541 (opinion of Stevens, J., concurring in part and dissenting in part).

Respondent seems to concede that this program is generally a rational one. Instead, respondent claims that Sections 1304 and 1307 are unconstitutional as applied to WMYK. Respondent further argues that in evaluating its as-applied claim, this Court must focus on the effect of the statute on WMYK alone, or else there is no difference between an as-applied and a facial challenge to a statute. Resp. Br. 16-28. Respondent, however, has confused standing requirements with the elements of its claim. Respondent has standing to challenge the constitutionality of 18

U.S.C. 1304 and 1307 insofar as those laws adversely affect it. Respondent cannot, however, transform a right to challenge those statutes into an immunity from their application on the ground that they are ineffective when applied to him. This Court has never analyzed the direct advancement prong of the *Central Hudson* test in that manner, and respondent has offered no good reason to start now.

In fact, *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), is to the contrary, as we explained in our opening brief (at 44-45). *Ward* ruled that the validity of regulation of the "time, place, and manner" of speech "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." 491 U.S. at 801. Only one week later, *Fox* concluded that the *Central Hudson* commercial speech test is "substantially similar" to the "time, place, and manner" test, which had been discussed in *Ward*. 492 U.S. at 477. *Fox* and *Ward* foreclose the claim that this Court should look solely to the impact of 18 U.S.C. 1304 and 1307 on WMYK to decide whether those laws directly advance Congress's interests. The direct advancement test thus looks to the whole picture—to the effect of a statute on every affected party—and asks whether that law, as applied to all parties, directly advances Congress's goals.

In any event, Sections 1304 and 1307 directly advance Congress's goals even when viewed just in connection with WMYK. The district court found that Sections 1304 and 1307 *do* slightly reduce the amount of Virginia Lottery advertising heard by North Carolinians. Pet. App. 23a ("It is probably true that a relatively small number of North Car-

olina listeners who listen only or mainly to Power 94 may hear significantly less lottery advertising"; "other North Carolinians may hear slightly less lottery advertising because they occasionally listen to Power 94."). Unless Virginia Lottery advertisements are ineffective, or unless no North Carolinians actually listen to WMYK—contentions that respondent and amici quite understandably do not advance—application of the advertising ban to WMYK reduces the amount of Virginia Lottery advertising generally broadcast to residents of North Carolina and thus reduces the demand for lottery tickets by such persons, thereby "directly advanc[ing]" North Carolina's interest.[11]

b. The last prong of the *Central Hudson* test requires that a regulation be no more extensive than necessary to advance the government's interests. 447 U.S. at 566; *Fox*, 492 U.S. at 475-481. Respondent does not claim that 18 U.S.C. 1304 and 1307 fail

[11] Respondent would force the courts to engage in unguided speculation regarding the effects of a law. Under respondent's theory, courts must engage in an undirected line-drawing exercise in order to determine whether a law persuades a sufficient number of residents, for a sufficient time, to reduce demand for gambling in a sufficient amount to be worth the cost of limiting advertising. Neither the text and history of, nor the values promoted by, the First Amendment supplies a principled means of gauging where that line should be drawn, and respondent provides no non-arbitrary ground for deciding when an effect ceases to be "speculative" and suddenly becomes "proven." Whether a statute achieves its intended effect and, if so, whether the costs are "worth it" are judgments better made by legislatures than by courts. Cf. *Gregg* v. *Georgia*, 428 U.S. 153, 186 (1976) (lead opinion) (the deterrent effect of criminal laws is better determined by legislatures than by courts).

that prong of the *Central Hudson* test. Amici, however, advance such an argument; they claim that those laws are unconstitutional since they are based entirely on the State to which a broadcaster is licensed and do not take into account the State(s) where an advertisement may be received. NAB Br. 12-13; ANA Br. 20.[12]

Congress could have designed the statutory scheme differently. Congress could have permitted a radio station to broadcast lottery advertising if the station's audience included residents of a State with a state lottery (thereby favoring States such as Virginia that operate lotteries), or Congress could have banned such advertising if the station's audience included residents of a State without a state lottery (thereby favoring States such as North Carolina that do not).[13]

[12] Amicus ANA argues that WMYK is actually licensed to both North Carolina and Virginia. ANA Br. 23-25. That claim is meritless. Not even respondent claims that it is licensed to Virginia. The complaint filed by respondent, the stipulation of facts between petitioners and respondent, the district court decision, the court of appeals decision, and the brief filed by respondent in this Court all make clear that WMYK is licensed to Elizabeth City, North Carolina. See J.A. 9 (amended complaint: "POWER 94 is licensed by the FCC to Elizabeth City, North Carolina"); J.A. 19 (stipulation: "WMYK is licensed by the FCC to Elizabeth City, North Carolina"); Pet. App. 10a (district court decision: "That station is licensed * * * to Elizabeth City, North Carolina."); Pet. App. 2a (court of appeals decision: "Power 94 is licensed by the Federal Communications Commission to Elizabeth City, North Carolina"); Resp. Br. 2. That also is the understanding of the FCC, which granted respondent the license to operate WMYK.

[13] In fact, the difficulty of choosing one state policy over another under such a scenario shows the wisdom of Congress's chosen approach of following the policy of the State of license.

But the fact that Congress could have drawn a different line scarcely means that the one Congress drew is unreasonable, which is what respondent and amici must prove. See *Fox*, 492 U.S. at 480. In fact, that line is consistent with the traditional rule that a State has power to regulate businesses within the State even if the firm's customers reside elsewhere. This regulatory scheme may put WMYK in a competitive disadvantage in regard to nearby Virginia radio stations, but that consequence is not an impermissible way to advance Congress's federalism interests, nor does it trench on values that the First Amendment was designed to protect.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

RENEE LICHT
Acting General Counsel
Federal Communications Commission

MARCH 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60205

No. 92-486

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

EDGE BROADCASTING COMPANY, t/a Power 94,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF RESPONDENT

BURT NEUBORNE
(Counsel of Record)
40 Washington Sq. South
New York, New York 10012
(212) 998-6172

GILBERT H. WEIL
60 East 42nd Street
New York, New York 10165
(212) 687-8573

Attorneys for A.N.A.

Questions Presented

1. May Congress forbid a broadcaster "licensed to" a location in North Carolina, a non-lottery state, from disseminating truthful information concerning the Virginia State lottery when ninety-two percent of the broadcaster's audience resides in Virginia; when the broadcaster's studio and corporate headquarters are in Virginia; and when the eight percent of the broadcaster's audience residing in North Carolina already receives identical messages from broadcasters in Virginia?

2. May North Carolina, a state which forbids lotteries, impede its residents from receiving truthful commercial information about the existence of a lawful state-run lottery in Virgina in order to give North Carolina's ban extra-territorial effect? If not, may Congress attempt to provide such an unconstitutional service for North Carolina?

3. Is a radio station with a transmitter in North Carolina exclusively "licensed to" North Carolina within the meaning of 18 U.S.C. sec. 1307 even though its studio and corporate offices are in Virginia and ninety-two percent of its audience resides in Virginia?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Statutes:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

No. 92-486

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—v.—

EDGE BROADCASTING COMPANY, t/a Power 94,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF RESPONDENT

Interest of Amici Curiae

The Association of National Advertisers, Inc., (A.N.A.) and The American Association of Advertising Agencies (A.A.A.A.) respectfully submit this brief *amici curiae* in support of respondent in this case. Letters of consent to the filing of this brief have been lodged with the clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to

advertise on a national and regional basis. *Amici*'s members market and advertise a kaleidescopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's two principal communities of commercial speakers, *amici* have long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

Statement of the Case and Summary of Argument

Lotteries have led a chequered existence in our culture. During the colonial period and the early days of the Republic, state-chartered private lotteries were a respectable activity. Thomas Jefferson himself sought permission to operate a lottery as a means of retiring his debt. During the era of Jacksonian reform, however, lotteries fell from favor and were universally outlawed by the states as sinful and unfair to the poor. In recent years, thirty-three states, including Virginia, have elected to operate state-run lotteries in order to raise money for governmental purposes. Seventeen states, including North Carolina, continue to ban lotteries, public and private. See generally Blakey and Kurland, *The Development of the Federal Law of Gambling*, 63 Corn. L. Rev. 923, 927-958 (1978).

Congressional legislation affecting lotteries was initially aimed at preventing the privately operated Louisiana lottery from unlawfully selling tickets to purchasers in the non-lottery states in violation of the laws of those states.[1] In its heyday, the Louisiana lottery generated 93% of its revenue by illegally selling tickets within the territory of non-lottery states, either

[1] By 1878, only one legal lottery remained in the United States—the Louisiana lottery. Thirty-five states banned all lotteries. Two states, Delaware and Vermont, permitted authorized lotteries, but failed to grant any authorizations.

through the mail or through direct delivery.[2] In 1868, Congress banned "letters or circulars concerning lotteries" from the mails in an effort to prevent the use of the mails by the Louisiana lottery to sell tickets unlawfully in non-lottery states.[3] *Ex parte Jackson*, 96 U.S. 727 (1878). In 1890, the postal ban was extended to newspapers containing lottery advertisements.[4] *In re Rapier*, 143 U.S. 110 (1892). In 1895, Congress banned the transportation of lottery tickets in interstate or foreign commerce in an effort to prevent the Louisiana lottery from relocating to Central America and using messengers instead of the mail to sell tickets unlawfully in non-lottery states.[5] *Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903). Finally, in 1934, a ban was imposed on the broadcast of "any advertisement or information concerning any lottery".[6]

[2] When the Louisiana lottery was finally terminated in the early 1890's, the volume of mail in the New Orleans Post Office fell by a third.

[3] Act of July 27, 1868, ch. 246, sec. 13, 15 Stat. 196; Act of July 12, 1876, ch. 186, sec. 2, 19 Stat. 90; currently codified as 18 U.S.C. 1301.

[4] Anti-Lottery Act of 1890, ch. 908, sec. 1, 26 Stat. 465; currently codified as 18 U.S.C. 1302.

[5] The 1895 Act has been narrowly construed to exempt persons who lawfully purchase a lottery ticket in a lottery state and then return to their home in a non-lottery state. *United States v. Fabrizio*, 385 U.S. 263, 272 (1966) (Stewart, J., dissenting).

[6] 18 U.S.C. 1304. Despite the broad language of the ban on broadcasting "information" about lotteries, courts have uniformly construed the statute narrowly to exempt news and opinion. Eg. *Frank v. Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989); *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3rd Cir. 1974) (en banc), vacated as moot, 420 U.S. 371 (1975). For additional examples of the tradition of narrowly construing the lottery statutes, see *Francis v. Ames*, 188 U.S. 375 (1903); *France v. United States*, 164 U.S. 676 (1897); *United States v. Halseth*, 342 U.S. 277 (1952); *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954).

During the period when lotteries were universally outlawed by the states, Congress' decision to ban commercial speech about private lotteries from the mails and the airwaves did not pose a difficult First Amendment issue. Since commercial speech inviting a hearer to engage in unlawful activity is entitled to no First Amendment protection, and since the lottery advertisements subject to the bans did just that by urging citizens of non-lottery states to purchase lottery tickets unlawfully in those states, the narrow holdings of both *Jackson* and *Rapier* remain good law today. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

Beginning in 1963, however, when New Hampshire decided to operate a lawful state-run lottery, lotteries have undergone a legal renaissance. In the ensuing 30 years, thirty-three states have decided to operate state lotteries. With state-run lotteries legal in fully two-thirds of the states, a Congressional ban on mailing, broadcasting or transporting truthful information about lotteries can no longer be justified as a device to prevent the dissemination of commercial speech inviting hearers to engage in unlawful activity, especially since, unlike the 19th century Louisiana lottery, state-run lotteries make no effort to sell lottery tickets in any state where it is unlawful to do so.

Confronted with radically changed circumstances, Congress modified its justification for the lottery speech bans. Instead of the 19th century argument that commercial speech about lotteries is wholly unprotected because it is an invitation to engage in pervasively unlawful activity, Congress now argues that its modified speech ban is designed to reinforce the policies of the 17 non-lottery states. Thus, under the new regime imposed by Sec. 1307, only speech emanating from a non-lottery state is banned.[7]

---

[7] 18 U.S.C. sec. 1307 provides, in part:

> The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to . . . an advertisement . . . concerning a lottery conducted by a State acting under the authority of State law which is . . . broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery.

If Sections 1304 and 1307 were aimed at preventing state-run lotteries from urging residents of non-lottery states to purchase lottery tickets within those states in violation of the laws of the non-lottery states, the current lottery speech ban would resemble its 19th century cousin. But all concede that unlawful sale of state-run lottery tickets within the borders of non-lottery states is not a problem. If residents of non-lottery states wish to purchase state-run lottery tickets, they must do so within the lottery state where the transaction is lawful. Thus, the only purpose of the contemporary Congressional censorship of speech about state-run lotteries is to prevent residents of non-lottery states from learning about their lawful option of travelling to a lottery state to purchase a lottery ticket. Accordingly, it flatly violates *Bigelow v. Virginia*, 421 U.S. 809 (1975).

In *Bigelow*, Virginia sought to make it a crime for newspapers published in Virginia to print truthful advertisements describing abortion services that were lawful in New York, but unlawful in Virginia. *Bigelow* unfolded during the interregnum between New York's decriminalization of abortion in 1970 and this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). During that period, the legality of abortion varied widely from state to state, much as the legality of lotteries varies from state to state today. This Court reversed the conviction of a Virginia newspaper for publishing a truthful advertisement about a lawful New York clinic, holding that Virginia lacked power to seek to keep its residents in ignorance of the existence of lawful options available to them in other states.[8]

---

[8] Under the "undue burden" standard adopted in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), variations between and among the states as to the lawful availability of abortion services will almost certainly evolve. The *Bigelow* principle at issue in this case assures that information about lawful options in less restrictive states will be available to residents of the more restrictive states.

In this case, Congress is attempting to provide precisely such an unconstitutional service to North Carolina and the other non-lottery states. Just as Virginia lacked power to use its police power in *Bigelow* to keep its citizens in ignorance of lawful options available to them in New York, Congress lacks a legitimate interest in assisting North Carolina in keeping its citizens in ignorance of lawful options available to them in Virginia.[9]

Moreover, in the context of this case, Congress' solicitude for the interests of North Carolina is particularly misplaced, since: (1) the message being censored is overwhelmingly directed to Virginia residents who constitute 92% of the listening audience; and (2) the broadcaster's studio and corporate headquarters are both located in Virginia. The fortuitous existence of an F.C.C. document licensing Edge Broadcasting to a transmitter on North Carolina soil cannot justify the censorship of a truthful message about the Virginia State lottery aimed overwhelmingly at Virginia residents, which is broadcast from a studio located in Virginia by a radio station with its corporate offices in Virginia. Whatever interest may exist in shielding North Carolina residents from information about lawful activities in Virginia, Congress may not deprive Virginia residents of truthful information about activities that are lawful in Virginia.

---

[9] *Bigelow* involved unconstitutional state censorship of newspapers. This case involves virtually identical Congressional censorship of broadcasters at the behest of a state. Whatever additional power Congress may have to regulate the broadcast spectrum, it does not include the power to "launder" unconstitutional state efforts to censor speech. *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984). As the legislative history of sec. 1307 makes clear, Congress' motive in imposing restrictions on speech about lotteries is purely derivative of its desire to reinforce the police power regulations of the non-lottery states. No independent federal interest underlies sec. 1307. H.Rep. No. 93-1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7007.

Finally, even if North Carolina had a legitimate interest in walling its citizens off from information about lawful options in Virginia—*amici* do not believe that such an interest would be legitimate—Congress' scheme is a hopelessly arbitrary and irrational means of advancing that interest, since the small percentage of the broadcast audience who actually live in North Carolina concededly—and lawfully—receive the identical information every day from broadcasters "licensed to" Virginia.

ARGUMENT

I. THIS CASE MAY NOT BE DISPOSED OF BY A SIMPLISTIC ASSERTION THAT THE "GREATER POWER" TO BAN LOTTERIES CARRIES WITH IT THE "LESSER POWER" TO BAN TRUTHFUL COMMERCIAL SPEECH ABOUT THEM

Instead of seeking to grapple with the difficult free speech and federalism issues raised by Congress' quixotic effort to build information walls around non-lottery states, the United States attempts a simplistic approach by arguing that since lotteries can be banned altogether, truthful commercial speech about them may be banned without raising a serious free speech issue. Relying on a misreading of the holding in *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986), the United States argues that the "greater power" to ban an activity necessarily carries with it the "lesser power" to ban truthful commercial speech about it.

Such an argument fails for two reasons. First, the assumption that voluntary participation in a lawful state-run lottery may be banned by Congress or by a neighboring state is flatly wrong. Neither Congress nor a neighboring state may punish persons for travelling to a lottery state to participate in a lawful state-run lottery. Thus, the so-called "greater power" simply does not exist in this case.

Second, and even more fundamentally, the assertion that government censorship may be used as a way to influence lawful consumer choice cannot be squared with the intellectual underpinnings of commercial free speech. The power to ban truthful speech about a lawful option is not a so-called "lesser power" subsumed within the general regulatory authority of the state. It is the most dangerous thing a government can do. It substitutes government manipulation of information for open regulatory debate. It treats Americans as pawns on a government-controlled information chessboard. Thus, banning truthful speech about lawful options may be justified, if at all, only under stringent rules imposed by the First Amendment.

A. The So-Called "Greater Power" to Ban Persons From Travelling to a Lottery State to Participate in a Lawful State-Run Lottery Does Not Exist

1. North Carolina Lacks Power to Bar Its Residents From Purchasing a State-Run Lottery Ticket in Virginia

North Carolina does not possess the "greater power" to ban its residents from travelling to Virginia to purchase a ticket in the state-run lottery. While North Carolina may exercise its police power to ban gambling within its borders, it may not seek to give its police power regulations extra-territorial effect by forbidding North Carolinians from engaging in the forbidden activity in a state where the activity is lawful.[10]

---

[10] Eg., *Brown-Forman Distillers v. N.Y. Liquor Authority*, 476 U.S. 573 (1986); *Edgar v. MITE Corporation*, 457 U.S. 624 (1982); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Huntington v. Atrill*, 146 U.S. 657, 669 (1892); *Kidd v. Pearson*, 128 U.S. 1 (1888).

Skiriotes v. Florida, 313 U.S. 69 (1941) is not to the contrary, since the arguably extra-territorial application of Florida law took place in international waters, not in a sister state where the activity in question was explicitly authorized by law.

The very essence of a federal union—expressed in the interrelationship between the Full Faith and Credit Clause of Article IV, Section 1, the Privileges and Immunities Clause of Article IV, Section 2, the Commerce Clause and the Due Process Clause of the Fourteenth Amendment—forbids a state from seeking to lock its residents into its parochial laws by giving them extra-territorial effect. For example, North Carolina forbids gambling. But it cannot forbid North Carolinians from gambling in Nevada. In 1972, Virginia forbade abortion. But this Court ruled in *Bigelow* that Virginia could not seek to prevent its residents from obtaining lawful abortions in New York. Thus, the suggestion that Congress is merely reinforcing North Carolina's "greater power" to ban the activity at issue in this case is untenable.

2. Congress Lacks Power to Prohibit Voluntary Participation in State-Run Lotteries

Strictly speaking, Congress' independent powers are not at issue in this case, since the avowed purpose of section 1307 is not to advance any independent federal policy, but merely to respect the legitimate police powers of the non-lottery states. H.Rep. No. 93-1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7007. Since the non-lottery states clearly lack the "greater power" to ban activity that is lawful in the lottery states, section 1307 can do no more than reflect that lack of power.

Moreover, Congress itself would lack the power to outlaw voluntary participation in a state-run lottery taking place within the lottery state. Relying on the 19th century cases dealing with the Louisiana lottery[11], the United States assumes that Congress possesses plenary authority to ban interstate participation in lotteries and, therefore, possesses plenary authority over speech about such lotteries. However, whatever Congress' power

---

[11] *Ex parte Jackson*, 96 U.S. 727 (1878); *In re Rapier*, 143 U.S. 110 (1892); *Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903).

under the Commerce Clause to ban participation in privately operated lotteries posing a danger of corruption and infiltration by organized crime, Congress lacks power to prohibit persons from voluntarily purchasing a lottery ticket from a state-run lottery within the lottery state. Whether the lack of Congressional power flows from the 10th Amendment, since state-run lotteries are integral parts of a state's taxing and funding structure[12]; from the constitutional right to travel, since Congress lacks the power under Article IV, Section 2 of the Constitution to lock Americans into the legal regime of a particular state[13]; or from the lack of a national police power[14], the net result is clear—the activity at issue in this case, the voluntary purchase of a state-run lottery ticket within the borders of a lottery state—is not within the so-called "greater power" of Congress to prohibit.

---

[12] Compare *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (Congress may not direct a state to move its capitol); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (Congress may not authorize involuntary bankruptcy of state political subdivision); and *United States v. New York*, 112 S.Ct. 2408 (1992) (Congress may not require states to perform regulatory functions) with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (Congress may apply federal minimum wage rules to state employees), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976).

[13] See Eg., *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (No. 3230) (C.C.E.D.Pa. 1823); *Crandall v. Nevada*, 73 U.S. 35 (1867); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *Toomer v. Witsell*, 334 U.S. 385 (1948); *United States v. Guest*, 383 U.S. 745, 757-59 (1966); *Doe v. Bolton*, 410 U.S. 179 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[14] Justice Harlan warned in *Maryland v. Wirtz*, 392 U.S. 183, 197, n.27 (1968) that the Commerce Clause may not be used as an indirect means of establishing a national police power over personal decisions more properly subject to regulation under state police power.

Thus, unlike the Commonwealth of Puerto Rico in *Posadas*, neither Congress nor North Carolina possesses constitutional power to ban the activity at issue in this case. Instead, the United States argues that Congress and North Carolina should be given an extra-constitutional power to ban the activity indirectly by the use of information control. The government's overbroad reading of *Posadas* is bad enough when applied to the facts of that case. But the attempt by the United States to effect an exponential increase in the reach of *Posadas* to permit censorship of speech by a sovereign in an effort to control behavior that is beyond its constitutional control would be a First Amendment and a federalism disaster.

B. The Power to Ban an Activity Does Not Carry With It the Power to Ban Truthful Commercial Speech About It As a Lawful Option

As *amici* have demonstrated, neither of the sovereigns seeking the power to censor in this case posesses the constitutional power to ban the activity at issue. Even if such a power existed, however, it would not justify banning truthful speech about a lawful activity. Government-imposed censorship may not be used as a behavior control device in an effort to manipulate the lawful choices open to Americans.

1. The Holding of *Posadas* Does Not Support the Dictum That Truthful Commercial Speech May Be Censored to Manipulate Consumer Demand For a Lawful Product

While dicta in the *Posadas* opinion suggests that the power to ban an activity includes the power to censor truthful commercial speech about it, the holding of the Court is far narrower. In *Posadas*, the Commonwealth of Puerto Rico wished to legalize casino gambling in an effort to enhance the tourism revenues of the Commonwealth. The Commonwealth initially banned all advertising by casinos that was capable of reaching the attention of residents of the Commonwealth. 478 U.S. at

332-33. In order to avoid First Amendment concerns, the Superior Court of Puerto Rico narrowed the total advertising ban, holding that advertisements in Spanish language papers likely to come to the attention of residents were protected, unless they were intentionally "aimed" at them. 487 U.S. at 335-36. Thus, as narrowed by the Commonwealth's courts, the ban included only promotional advertising intentionally designed to exacerbate the potentially unfair attraction of the casinos to an audience deemed particularly vulnerable by the legislature of Puerto Rico.

In *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), this Court affirmed the ban as narrowed by the Commonwealth's courts. While portions of the Chief Justice's opinion speak more broadly than necessary, the *Posadas* holding merely reiterates the well-established principle that advertising intentionally designed to exploit a particularly vulnerable audience may be limited. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).[15]

2. The Dictum in *Posadas* is Inconsistent With Established First Amendment Analysis

In the absence of speech intentionally designed to exploit a particularly vulnerable audience, the dictum in *Posadas* is untenable. The very purpose of granting First Amendment protection to commercial speech was the recognition that truthful

[15] *Amici* believe that even the narrow ban imposed by the Commonwealth's courts was unconstitutional, since it was premised on an assumption that residents of Puerto Rico are less competent than North Americans to assess the effects of truthful casino advertising. While the increased deference shown to legislative judgments involving cultures and social systems different from our own may explain the Court's deference to the Commonwealth's legislative judgment in *Posadas*, an attempt to transfer its paternalistic (and racist) premises to First Amendment law generally would be a drastic mistake. Competence to assess truthful speech does not vary by race, class or gender.

advertising provides consumers with the necessary raw material for informed and autonomous choice. *Morales v. T.W.A.*, 112 S.Ct. 2031 (1992). Unlike First Amendment protection for political or artistic speech which is largely driven by concern for the dignitary interest of the speaker, the engine that drives commercial speech is the instrumental need of a consumer for information that enhances the capacity for free choice.[16] Indeed, only when a cognizable hearer interest has been absent has the Court upheld censorship of commercial speech.[17]

When, as with the 19th century advertising for the Louisiana lottery, the "choice" offered to a consumer involves the com-

[16] Eg. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976) (right to receive commercial messages); *Linmark Associates, Inc. v. Borough of Willingboro*, 431 U.S. 85, 96-97 (1977) (right to receive real estate information); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (right to receive birth control information); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) (right to receive price information on legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (right to receive information on electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (right to receive information on legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (right to receive birth control information); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (right to receive information on legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 110 and n.18 (1991) (same).

[17] Eg. *Friedman v. Rogers*, 440 U.S. 1 (1979) (risk of misleading hearers justifies restriction on use of trade names by optometrists); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (lack of cognizable hearer interest justifies banning speech proposing unlawful commercial transaction); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (safety interest of student-hearers justifies stringent regulation of outsiders in college dormitories; remanded to determine whether regulation unconstitutionally overbroad).

mission of an unlawful act, the consumer has no legitimate interest in receiving the information. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). Similarly, when advertising is false or misleading, it does not enhance the capacity of a consumer for free choice. Quite the contrary, it distorts free choice by undermining its raw material. *Friedman v. Rogers*, 440 U.S. 1 (1979). Finally, when the "choice" offered a consumer is not a free one, because the consumer is in a particularly vulnerable situation, as in the case of an accident victim confronted by a prospective lawyer, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the commercial speech at issue may be regulated, but not banned, to prevent the intentional exploitation of the vulnerable consumer. *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1991)

But where, as here, the consumer choice is lawful; the advertisement is truthful; and the speech is not an intentional effort to mislead a particularly vulnerable audience, the First Amendment forbids the government from censoring a commercial message in an effort to manipulate the behavior of the hearer.

The dictum in *Posadas* arguing that the power to regulate an activity carries with it the power to censor truthful commercial speech about it is premised on two faulty assumptions. First, the dictum assumes that, in the area of constitutional rights, the axiom that "the greater power necessarily includes the lesser power" is good law; and, second, that censorship of speech about a lawful activity is a "lesser" form of regulation than a flat ban on the activity. Both are demonstrably wrong.

The argument that the "greater" governmental power to prevent an activity entirely authorizes the government to place whatever "lesser" conditions it wishes on its exercise, has been rejected in every context in which it has been asserted. See generally, Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988). This Court has repeatedly recognized that one of the most important functions of a constitution is to constrain the government in placing unconstitutional conditions on the exercise of its so-called discretionary functions.[19]

Thus, when Justice Rehnquist argued that merely because the government could decide whether or not to create certain categories of employment, an employee must "take the bitter with the sweet" and accept a job conditioned on a waiver of procedural due process rights, this Court firmly rejected his position. Compare, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Justices Rehnquist, Stewart and Chief Justice Burger) with *Id* at 167 (opinion of Justices Powell and Blackmun); *Id* at 185 (opinion of Justice White); *Id* at 211 (opinion of Justices Marshall, Brennan and Douglas). Indeed, the Chief Justice's "bitter with the sweet" approach was explicitly rejected by eight members of the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Similarly, when the Chief Justice argued that since the government was under no duty to fund non-commercial television, it could condition funding on a waiver of the ability to broadcast privately funded editorials, the Court explicitly rejected

---

[19] Eg. *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984). For an early statement of the principle, see *Frost v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926).

his position, holding that the "greater" power did not include the "lesser" power to censor.[20] *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984).

The Court should similarly reject Chief Justice Rehnquist's dictum in *Posadas*.

In defense of his dictum, the Chief Justice argued in *Posadas* that censoring commercial speech about an activity is a less drastic government response than an outright ban. But such an argument misconstrues a fundamental postulate of a free society—the integrity of autonomous, indivdual choice.

Regulation of behavior is inevitable in a complex world. While it interferes with autonomous choice, regulation of behavior occurs openly, and only after a full political debate. Regulation of thought achieved through government manipulation of the flow of truthful information is a far more "drastic" event, since it attacks autonomous choice in a covert manner. It leaves citizens with the illusion of freedom. Each believes that his or her decisions are the product of free will. In fact, however, information control masks the reality of government manipulated behavior. A free society can tolerate regulation of behavior. A free society cannot survive regulation of thought.

Nor can the Chief Justice's dictum be defended because it applies solely to commercial speech. The interest of a consumer in receiving truthful information relevant to the making of informed economic decisions is no less important than the interests at stake in other free speech settings. While the rules governing commercial and non-commercial speech differ, they do so because of functional differences between the two areas and not because commercial speech is less important or of lower social value. Differential standards of speech protection

[20] *Rust v. Sullivan*, 112 S.Ct. 1759 (1989), even if correctly decided, is not to the contrary, since it dealt with the government's right to decide how its own resources were to be expended. This case attempts to dictate the speech of private actors using their own resources.

should not turn on subjective, necessarily content-based value judgments about the relative social worth of categories of expression. *Young v. American Mini Theaters*, 427 U.S. 50, 82, n.6 (1976) (Powell, J. concurring); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J. concurring). Implicit in a determination that commercial speech is less important than non-commercial speech is a complex set of value judgments that the First Amendment leaves to individuals, not to the State. Characterizing speech about religion, esthetics or politics as important, while denigrating the importance of speech about commerce, masks an impermissible cultural judgment. In effect, it says that speech about ideas, the "business" of intellectuals, is free from governmental restriction; but that speech about everyone else's "business" is fair game for casual regulation by the State. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384 (1974); Director, *The Parity of the Economic Marketplace*, 7 J.L. & Econ. 1 (1964); Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

Moreover, an assertion that commercial speech is less important than non-commercial speech is wrong, both at the level of society and the individual. The First Amendment protects political democracy and free markets by assuring the uncensored flow of information on which each depends. Political democracy requires robust free speech protection in order to assure that voters receive information needed to make an informed choice. See Meiklejohn, *Free Speech and Its Relationship to Self-Government* (1948).

Free markets also depend upon informed choice. *Morales v. T.W.A.*, 112 S.Ct. 2031 (1992); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976) (recognizing relationship between commercial speech and efficient markets). See Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977). Consumers vote with their dollars, just as citizens vote with their ballots. If government

can casually control the flow of political information to voters, the free political choice at the core of a functioning democracy is imperilled. See Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191. Similarly, if government can casually control the flow of commercial information to consumers, the free market choice at the core of our economic system is imperilled. See Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash L. Rev. 429 (1971).

Thus, the Chief Justice's dictum in *Posadas* should be rejected.

II. THE ATTEMPT TO CENSOR RESPONDENT DOES NOT DIRECTLY ADVANCE A SUBSTANTIAL GOVERNMENTAL INTEREST. ACCORDINGLY, IT CANNOT SURVIVE ANALYSIS UNDER *CENTRAL HUDSON*

Whatever the fate of the dictum in *Posadas*, any effort to censor commercial speech must satisfy the exacting standard established in *Central Hudson Gas & Electric Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980). Pursuant to the *Central Hudson* test, if commercial speech is truthful and concerns a lawful product, it may be regulated only in aid of a "substantial governmental interest"; only if the regulation "directly advances" that interest; and only if the regulation is "narrowly tailored".

A. The Lottery Speech Ban Does Not Advance a Legitimate Governmental Interest, Much Less a "Substantial" One

As *amici* have demonstrated, the only governmental interest advanced by the speech ban imposed by section 1307 is the desire to prevent North Carolinians from learning about the existence of a lawful option available to them in Virginia.

Since North Carolina does not possess constitutional power to ban its citizens from travelling to Virginia in order to engage in lawful activities there, the only conceivable reason for the ban is to prevent North Carolinians from learning about lawful options existing beyond the state's borders. This Court has already firmly branded such an interest as constitutionally illegitimate. *Bigelow v. Virginia*, 421 U.S. 809 (1975).[21]

B. The Lottery Speech Ban Does Not "Directly Advance" Any Governmental Interest At All

Even if one assumes that North Carolina's interest in keeping its residents in ignorance of lawful options open to them in Virginia is legitimate; even substantial, section 1307 does not "directly advance" that interest, since it explicitly authorizes

[21] *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 D.D.C. 1971) aff'd summarily, 405 U.S. 1000 (1972) provides no support for the selective ban on lottery advertisements for four reasons. First, *Capital Broadcasting* was decided before First Amendment protection was afforded to commercial speech. Second, Congress, in enacting section 1307, relied solely on reinforcing North Carolina's police power. Accordingly, the statute must stand or fall on the legitimacy of North Carolina's interest in shielding its citizens from information about lawful activities in Virginia. Third, the legitimate Congressional interest in *Capital Broadcasting* did not involve an effort at content-based censorship. Rather, it turned on the difficulty of applying the "fairness doctrine" to tobacco advertising. Finally, the District Court declined to grant the broadcaster-litigants standing to raise the free speech interests of advertisers. 333 F. Supp. at 584. See generally, 333 F. Supp. at 587-594 (J. Skelly Wright, dissenting).

Whatever regulatory power Congress may possess over broadcasting under the so-called "scarcity" rationale to assure that an issue like the health hazards associated with smoking is covered "fairly", it does not include the power to make arbitrary, content-based judgments designed to shield the citizens of one state from truthful information describing lawful options available to them in a neighboring state. *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984).

broadcasters "licensed to" Virginia to broadcast the forbidden message into North Carolina. Pursuant to section 1307, the eight percent of respondent's audience that lives in North Carolina is virtually unaffected by the ban, since they already receive the same information from Virginia broadcasters. Thus, the sole practical effect of the censorship is to deprive respondent of the advertising revenue derived from Virginia businesses at which lottery tickets may be lawfully purchased—a wholly irrational and discriminatory result. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

The only governmental interest actually served by the censorship is symbolic. But symbolism cannot justify censorship that blocks residents of a state from receiving information concerning lawful options available in other states.

C. The Lottery Speech Ban is Not "Narrowly Tailored"

Finally, even if North Carolina's interest were deemed legitimate; and even if the regulation could be said to "directly advance" that interest, it is not "narrowly tailored" within the meaning of *Central Hudson*. As with the original advertising ban in *Posadas* that was narrowed by the Commonwealth's courts, section 1307 makes no effort to distinguish between speech "aimed" at a Virginia audience and speech intentionally "aimed" at North Carolinians. Thus, for example, the ban forces respondent to reject advertisements for Virginia businesses, such as "7/11 Stores" merely because the advertisement includes a statement that Virginia State lottery tickets are available on the premises. Such an unnecessarily overbroad ban is precisely analagous to the flat ban on casino advertising in the Spanish language press that was originally banned by Puerto Rico. The Superior Court of Puerto Rico invalidated such a ban as too broad, replacing it with a far narrower ban on advertising intentionally "aimed" at residents. No reason exists why the F.C.C. ban should not be similarly narrowed.

D. The Constitutionality of a Content-Based Speech Ban Must Be Determined on an "As Applied" Basis.

Stung by the obvious irrationality of the operation of section 1307 in this case, the United States attempts an unprecedented flight from the facts. Since, the United States argues, section 1307 might have a more defensible application to radio stations broadcasting within a single state, its constitutionality must be upheld even in those settings where, as here, censorship is utterly irrational.[22] Brief of United States at p. 33.

The government's argument confuses the standard of review used in rare settings where legislation regulating speech or association is subjected to facial review with the standard of review in traditional "as applied" cases. In recent years, the Court has occasionally departed from the traditional rule that litigants in First Amendment cases must challenge statutes as applied to them and has permitted litigants to challenge the facial constitutionality of censorship statutes without regard to the precise facts of the litigant's case.[23] In each setting where facial review has been permitted, the Court feared that widespread censorship might take place unless the rule requiring "as applied" review was relaxed. Thus, a litigant seeking facial review must demonstrate that the challenged statute is likely to violate First Amendment rights in a significant percentage of its applications. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). The robust nature of commercial speech has made it unnecessary, however, to resort to facial review techniques. Thus, in a commercial speech setting,

---

[22] As *amici* have argued, North Carolina lacks a legitimate interest in forbidding its citizens from hearing advertisements for state-run lotteries in nearby states, even if a broadcast signal were beamed to a predominantly North Carolina audience. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[23] Eg. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (facial overbreadth); *Smith v. Goguen*, 415 U.S. 566 (1974) (facial vagueness); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (content-based discrimination).

a litigant is *required* to challenge the statute "as applied", relying solely on the facts of his or her case. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-80 (1977).

The claim of the United States that the statute must be upheld if it is capable of constitutional applications elsewhere, even though its current application is indefensible, boils down to the unprecedented assertion that a litigant who is *required* to raise an "as applied" challenge to a censorship statute may not succeed unless the litigant proves that the statute will be facially unconstitutional in a significant percentage of its applications, regardless of whether it is constitutional as applied in the litigant's case.

Not surprisingly, the United States is unable to cite First Amendment precedent dealing with content-based censorship for its revolutionary attempt to graft facial review standards onto the "as applied" process. Indeed, the United States concedes that classic "as applied" review has been the norm in commercial speech cases. *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-80 (1977). Instead, the United States argues that standards of review utilized in equal protection cases involving rational basis scrutiny provide an analogy. *Vance v. Bradley*, 440 U.S. 93 (1979). But the very reason that *Virginia Pharmacy* recognized First Amendment protection for commercial speech in the first place was to escape from rational basis scrutiny that virtually assured widespread censorship of information of assistance to consumers in making informed market judgments.

The United States also argues that time, place or manner regulations can be applied to speakers even when they are not strictly necessary in the particular case, as long as they are likely to be necessary in most cases. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). But it is one thing to require a speaker to comply with a reasonable time, place or manner

rule; it is quite another to silence a speaker absolutely for no reason at all. When, as here, the consequence of government regulation is a content-defined ban on speech (not merely its regulation as to time, place, or manner), the government cannot defend the censorship merely by arguing that censorship in some other setting would be constitutional. No case has ever suggested that irrational censorship is valid merely because censorship in an entirely different setting might be defensible.

In fact, the United States' attempt to avoid defending its censorship on the facts of this case is premised on a re-run of its argument that the greater power to ban lotteries carries with it a virtually uncontrolled discretion to manipulate commercial speech about lotteries in order to "regulate" consumer demand. As the United States candidly admits, the extraordinary power to censor irrationally that is sought in this case is necessary because government censors "must be free to experiment with a variety of regulatory measures in order to limit consumer demand to whatever level is deemed appropriate". Brief of United States, p.35. Thus, only if commercial speech is reduced to wholly unprotected status and subjected to the permissive level of rational basis scrutiny applied in non-speech settings can the government's proposed standard of review be taken seriously.

III. RESPONDENT IS "LICENSED TO" BOTH NORTH CAROLINA AND VIRGINIA WITHIN THE MEANING OF SEC. 1307.

It is clear, both from the legislative history of section 1307, thoroughly discussed in the decision of the District Court, 732 F. Supp. at 643-46, and from F.C.C. practice, that the term "licensed to" means, at a minimum, the community described in the F.C.C. licensing document where the station's transmitter is often located. Thus, at a minimum, respondent is "licensed to" North Carolina.

But nothing in the language of section 1307, or in F.C.C. practice, prevents a broadcaster from being "licensed to" more than one community. Indeed, a number of radio stations have been licensed to more than one state.[24] Where, as here, a radio station maintains its studio and its corporate headquarters in Virginia and broadcasts to an audience that is ninety-two percent Virginian, but maintains its transmitter in North Carolina, the station should be deemed "licensed to" both North Carolina and Virginia for the purposes of section 1307.

While the phrase "licensed to" has an accepted meaning in F.C.C. practice, the proposed construction would respect that meaning by recognizing that respondent is "licensed to" North Carolina. Nothing in F.C.C. practice, however, requires treating the term as having only one fixed and unchanging meaning. *Amici* suggest that for 1307 purposes, the phrase can mean, in addition to its F.C.C. term of art, the state in which the broadcast studio is located, in which corporate headquarters are situated, and in which the vast bulk of the audience resides.

Such a construction of section 1307 is textually plausible, consistent with the underlying purpose of section 1307 and, most importantly, would save the statute from almost certain invalidation. *Lowe v. S.E.C.*, 472 U.S. 181 (1985); *DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 573-576 (1988).

In *Debartolo*, the Court required an "affirmative" expression by Congress of its desire to ban "consumer publicity" leafletting. See also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Similarly, the Court should construe "licensed to" in section 1307 as referring to both North Carolina and Virginia, thereby permitting respondent to broadcast truthful advertisements about the Virgina State lottery to a predominantly Virginia audience, unless Congress has "affirmatively" expressed an intention to ban the speech in question.

[24] The F.C.C. agrees that if a broadcaster is "licensed to" two states, one of which is a lottery state, it qualifies for the exemption from section 1304 provided by section 1307. H.Rep. No. 93-1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7007, 7022. As of 1974, fifty-two radio stations were "licensed to" more than one location. Five of the dual license stations were "licensed to" two states. *Id.* at 7022.

While the District Court was correct in observing that Congress declined to remove all geographical controls from section 1307 in 1988, 732 F. Supp. at 645-46, Congress' desire to continue a geographically defined ban on predominantly intra-state stations does not constitute an affirmative command to impose the ban on a station that overwhelmingly broadcasts to a lottery state audience *and* which has its studio and its corporate headquarters in a lottery state.

Conclusion

For the above-mentioned reasons, the decisions of the courts below should be affirmed.

Dated: New York, New York
February 16, 1993

Respectfully submitted,

Burt Neuborne (Counsel of Record)
40 Washington Sq. So.
New York, New York 10012
(212) 998-6172

Gilbert H. Weil
60 East 42nd Street
New York, New York 10165
(212) 687-8573

Attorneys for Amici Curiae

Of Counsel:

JOHN F. KAMP
1899 L STREET N.W.
Suite 700
Washington, D.C. 20036
(202) 331-7345

No. 92-486

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

EDGE BROADCASTING COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF BROADCASTERS; AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.; AMERICAN CIVIL LIBERTIES UNION; DOW JONES & COMPANY; GANNETT CO., INC.; THE HEARST CORPORATION; MAGAZINE PUBLISHERS OF AMERICA, INC.; THE MEDIA INSTITUTE; MULTIMEDIA BROADCASTING COMPANY; NATIONAL BROADCASTING COMPANY, INC.; NEWSPAPER ASSOCIATION OF AMERICA; NORTH CAROLINA ASSOCIATION OF BROADCASTERS, INC.; POST-NEWSWEEK STATIONS, INC.; PROVIDENCE JOURNAL COMPANY; SOCIETY OF PROFESSIONAL JOURNALISTS; TIME INC.; TRIBUNE COMPANY; AND WESTINGHOUSE BROADCASTING COMPANY, INC., IN SUPPORT OF RESPONDENT

Of Counsel:
HENRY L. BAUMANN
Executive Vice President
and General Counsel
STEVEN A. BOOKSHESTER
Associate General Counsel
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 "N" Street, N.W.
Washington, D.C. 20036
Attorneys for National Association of Broadcasters

P. CAMERON DEVORE *
MARSHALL J. NELSON
SIMA F. SARRAFAN
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

(List of Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JOHN KAMP
AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.
1899 L Street, N.W.
Washington, D.C. 20036
Attorney for American Association of Advertising Agencies, Inc.

STEVEN R. SHAPIRO
JOHN A. POWELL
AMERICAN CIVIL LIBERTIES UNION
132 West 43 Street
New York, NY 10036
Attorneys for American Civil Liberties Union

STUART D. KARLE
DOW JONES & COMPANY, INC.
200 Liberty St.
New York, NY 10028
Attorney for Dow Jones & Company, Inc.

BARBARA W. WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
Attorney for Gannett Co., Inc.

VICTOR F. GANZI
ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Ave.
New York, NY 10019
Attorneys for The Hearst Corporation

KENNETH M. VITTOR
SLADE R. METCALF
C/O MAGAZINE PUBLISHERS OF AMERICA, INC.
575 Lexington Ave.
New York, NY 10022
Attorneys for Magazine Publishers of America, Inc.

RICHARD E. WILEY
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 "K" Street, N.W.
Washington, D.C. 20006
Attorneys for The Media Institute

DAVID P. FLEMING
Vice President and General Counsel
MULTIMEDIA BROADCASTING COMPANY
701 E. Douglas, Union Station
Wichita, KS 67202
Attorney for Multimedia Broadcasting Company

ROBERTA R. BRACKMAN
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
Room 1022
New York, NY 10112
Attorney for National Broadcasting Company, Inc.

JOHN F. STURM
RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF AMERICA
11600 Sunrise Valley Dr.
Reston, VA 22091
Attorneys for Newspaper Association of America

WADE H. HARGROVE
MARK J. PRAK
THARRINGTON, SMITH & HARGROVE
209 Fayetteville Street
Raleigh, N.C. 27602
Attorneys for North Carolina Association of Broadcasters, Inc.

L. STANLEY PAIGE
POST-NEWSWEEK STATIONS, INC.
1150 15th Street, N.W.
Washington, D.C. 20071
Attorney for Post-Newsweek Stations, Inc.

MICHAEL B. ISAACS
PROVIDENCE JOURNAL COMPANY
75 Fountain St.
Providence, RI 02902
Attorney for Providence Journal Company

BRUCE W. SANFORD
HENRY S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
Washington Square
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for the Society of Professional Journalists

HARRY M. JOHNSTON III
TIME INC.
1271 Avenue of the Americas
New York, NY 10020
Attorney for Time Inc.

DAVID D. HILLER and
CHARLES J. SENNET
TRIBUNE COMPANY
435 North Michigan Ave.
Suite 2010
Chicago, IL 60611
Attorneys for Tribune Company

MARTIN P. MESSINGER
BRYAN T. MCGINNIS
WESTINGHOUSE BROADCASTING COMPANY, INC.
888 Seventh Ave., 39th Floor
New York, NY 10106
Attorneys for Westinghouse Broadcasting Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-486

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

EDGE BROADCASTING COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF BROADCASTERS; AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.; AMERICAN CIVIL LIBERTIES UNION; DOW JONES & COMPANY; GANNETT CO., INC.; THE HEARST CORPORATION; MAGAZINE PUBLISHERS OF AMERICA, INC.; THE MEDIA INSTITUTE; MULTIMEDIA BROADCASTING COMPANY; NATIONAL BROADCASTING COMPANY, INC.; NEWSPAPER ASSOCIATION OF AMERICA; NORTH CAROLINA ASSOCIATION OF BROADCASTERS, INC.; POST-NEWSWEEK STATIONS, INC.; PROVIDENCE JOURNAL COMPANY; SOCIETY OF PROFESSIONAL JOURNALISTS; TIME INC.; TRIBUNE COMPANY; AND WESTINGHOUSE BROADCASTING COMPANY, INC., IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

Amici are national and local broadcasters, newspaper and magazine publishers, associations representing the media and journalists, and associations defending civil

liberties under the First Amendment. These groups share a continuing commitment to preserving First Amendment protection for all forms of lawful speech, and have often appeared before the Court to argue the broadest protection for commercial speech.*

In this case, Amici wish to respond to the aggressive arguments of the Petitioners, which, if accepted by this Court, not only would undermine the carefully balanced four-part test adopted by this Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) and applied thereafter in a substantial body of cases, but could effectively signal the end of First Amendment protection for commercial speech. Amici believe that government's only legitimate role in the regulation of commercial advertising in a pluralistic society is to assist consumers in receiving truthful, nonmisleading information to aid in their making informed choices about lawful products and services. To utilize advertising speech regulation as a back door method of manipulating consumer decisions is to exceed that proper role and is inconsistent with this Court's teachings under the First Amendment.

These principles apply equally when the advertising speech concerns legal products or services that may be seen by some as "immoral." If the Court were to adopt Petitioners' position that speech about legal but ostensibly "bannable" products or services can be regulated or forbidden without First Amendment constraint, commercial speech prohibition would be permissible at the majoritarian whim of any government entity.

SUMMARY OF ARGUMENT

The Court has long upheld the First Amendment's protection of commercial speech and has placed the burden on the government to justify attempted encroachments

* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

upon it. The four-part test articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), carefully balances governmental interests against the constitutional protection given to commercial speech. The government must comply with each of the four prongs of the *Central Hudson* test.

The restrictions on lottery advertising urged by Petitioners in this case fail the *Central Hudson* test because they are not "narrowly tailored" and fail to "directly advance" the asserted governmental interest. Petitioners describe this interest as discouraging lottery participation in states that do not sponsor lotteries, while at the same time accommodating lottery promotion in states that do. Application of the restrictions to Respondent, however, does not serve this interest. Instead, the effect of these restrictions is to deprive Virginia listeners of the opportunity to hear promotions for Virginia's lottery, while listeners in this Respondent's region of North Carolina are inundated daily with Virginia lottery promotions in television, radio, and newspaper advertising originating in Virginia.

On a broader scale, the fact that the advertisements at issue in this case concern the controversial topic of state lotteries should increase, not diminish, the level of First Amendment protection. Suppressing commercial speech in order to protect citizens from the presumed evils of lottery advertising, is inconsistent with this Court's strong pronouncements against such paternalism and in favor of more, not less, information as the appropriate means to encourage informed economic decision making.

Speech about legal state lotteries should not be relegated, as the Government argues, to a new and lesser subcategory of speech. It is fundamental to the First Amendment rationale for commercial speech protection that "if [commercial speech] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions

as to how that system ought to be regulated or altered." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Advertising concerning state lotteries fulfills both of these functions. Obviously, it tells the public what kind of legal games are available and where, but it also reaches those who are adamantly opposed to state lotteries. Actual lottery advertising provides the most direct information about state lottery activities to both groups of voters, whose individual decisions will determine whether and to what extent a state should adopt state-sponsored lotteries.

Petitioners' reliance on *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), to cure their failure to meet *Central Hudson* is equally misguided. *Posadas* differs from the instant case in several critical respects: *Posadas* involved a facial challenge, whereas the instant case challenges the regulations as applied; the regulations in *Posadas* were held to be "narrowly tailored" under the *Central Hudson* test, whereas the Petitioners here suggest that *Posadas* excuses application of the test altogether because the *activity* of gambling, although lawful in this case, could be banned. More fundamentally, however, the statement cited by Petitioners in support of this view not only is dictum, but has been widely and sharply criticized. The concept that because government can ban an *activity*, it is permited to ban *speech about* the activity, cannot withstand First Amendment scrutiny and should be rejected by the Court.

Allowing First Amendment protection for commercial speech to ride solely upon the decision of lawmakers as to which activities they may or may not wish to ban at a given time, removes the responsibility for guarding free speech from the Court and relegates it to the protection of majoritarian legislative whim. This is precisely what the First Amendment does not allow.

ARGUMENT

I. COMMERICIAL SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

The Court has long recognized the unique informational value of commercial speech in our society and held that it is unquestionably protected by the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As the Court stated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985):

> There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment. . . .

That constitutional protection has been repeatedly affirmed by the Court against a variety of asserted state interests.[1]

In these cases, the Court has recognized that there is both a right to advertise and a reciprocal right to receive commercial information in advertising form. *Virginia State Board*, 425 U.S. at 757. Thus, commercial speech serves more than the economic interests of the speaker; it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson*, 447 U.S. at 561-562. Consumers' interest in commercial speech may well be greater than their interest in "the day's most urgent political debate." *Virginia*

---

[1] *See, e.g., Peel v. Attorney Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

State Board, 425 U.S. at 763. Similarly, society as a whole has an interest in the free flow and exchange of commercial information. As the Court noted in *Virginia State Board*, our free enterprise economy is driven by the private economic-decision making of individuals, and "[i]t is a matter of public interest" that individuals have the information necessary to make intelligent and well-informed decisions. *See id.* at 765. "To this end, the free flow of commercial information is indispensable." *Id.*

The Court has rejected the "highly paternalistic approach" of trying to protect the public by manipulating the information it receives. *See Virginia State Board*, 425 U.S. at 770. The Court's insistence on more speech rather than less is based upon fundamental assumptions about the American public that are central to all First Amendment jurisprudence: our citizens are assumed to be intelligent, mature, and collectively capable of making their own choices if provided with adequate information. As the Court stated in *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977): "[W]e view as dubious any justification that is based on the benefits of public ignorance." 433 U.S. at 375.

Advertising of state-sponsored lotteries is commercial speech no less deserving of First Amendment protection than any other advertisements. At the most immediate level, the lottery advertising prohibited in a balkanized fashion by these statutes conveys useful commercial information. It tells the public what kind of legal lottery games are available and where, the stakes involved, and the identity of the sponsoring state. The Court acknowledged the public's legitimate interest in all such information in *Virginia State Board*, 425 U.S. at 765:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

That a subject matter is controversial and may be a hotly debated policy issue among the citizens of a state, enhances rather than diminishes the need for First Amendment protection. Lotteries are at the center of just such a debate. The number of states deciding to sponsor lotteries has sharply increased in recent years. Proponents view state lotteries as a legitimate means of entertainment and as a way to raise government funds for significant social priorities without inviting public protests against new taxes. Opponents view them as an evil for the poorest members of society, who are enticed to participate in such activities against their better interests and to their detriment.

The federal government's stated interest in the statute at issue is that of upholding the policy choices of states, such as North Carolina, that have chosen not to conduct state lotteries. This overlooks a simply but critical point. It is not the "state" in the abstract that makes these policy choices, but the citizens who reside there. If the citizens of North Carolina have decided until today that they do not wish to have a state lottery, they are perfectly free to decide tomorrow that they will institute one. In a dynamic and changing society, where all citizens are presumed to be intelligent decision makers, depriving those citizens of information necessary to debate and alter public policy hamstrings their ability to perceive and ultimately to make better political choices.

Without lottery advertising, the public is deprived of an important source of information about lotteries for which it cannot practically rely on the occasional news story or editorial. The true extent and character of state lotteries and how they appeal to the public are best conveyed by the sponsors' own announcements in broadcast and print advertising. In the present case, the effect of the government's position would be to deprive the citizens of these contiguous regions of North Carolina and Virginia of this information on radio advertising from a major regional broadcaster, where there are absolutely

no legal limits on such information crossing the state border in newspapers, magazines, or other broadcast media, originating in Virginia.

Lottery advertising is a form of speech well within the protection of the First Amendment, and the government's attempt to keep it from the public is based solely on the "public ignorance" justification flatly rejected by the Court in *Bates*, 433 U.S. at 375. As Justice Brandeis stated in *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring):

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

II. THE GOVERNMENT BEARS THE BURDEN OF JUSTIFYING ENCROACHMENTS UPON PROTECTED SPEECH.

A. The Government Must Meet Each of the Four Parts of the *Central Hudson* Test.

In *Central Hudson*, 447 U.S. at 566, the Court distilled a carefully balanced doctrine and analytical test from the reasoning of a substantial body of earlier cases concerning commercial speech.[2] The now familiar four-

[2] *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979) (government may ban forms of commercial speech lacking informational content and more likely to deceive the public than to inform it); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (speech cannot be denied First Amendment protection merely because its source is a corporation rather than an individual); *In re Primus*, 436 U.S. 412 (1978) (state cannot use anti-solicitation rules to prohibit attorney from offering free services to potential client); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978) (state may ban oppressive in-person lawyer solicitation); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance prohibiting placement of "For Sale" signs by homeowners in order to advance governmental objective of racially integrated neighborhood was unconstitutional); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (First Amendment prohibits state from suppressing contraceptive advertisements); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (blanket suppression of advertising by attorneys of routine legal services violates the First Amendment); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (impermissible under First Amendment for state to infringe upon newspaper's right to publish commercial advertisement conveying abortion information); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) (government may ban commercial speech constituting illegal activity).

part test to determine whether government regulation or restriction of commercial speech is permissible was articulated by the Court as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The reasoning and practical application of the test announced in *Central Hudson*, are not unlike the approaches developed by the Court in other areas of protected speech, with the significant difference that under Part One of *Central Hudson*, misleading, false or illegal commercial speech may be regulated or banned. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 377 (1968) (conduct combining "speech" and "non-speech" elements can be regulated if: the regulation is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the

furtherance of that interest). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (government may impose reasonable restrictions on time, place, or manner of protected speech in a public forum, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

Clearly, *Central Hudson* has become part of the mainstream of First Amendment jurisprudence. Since its formulation, the Court has relied upon the four-part test to probe government efforts to ban commercial speech and to reject those efforts where the government fails to meet all parts of the test. *See, e.g., Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989);[3] *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Metromedia v. San Diego*, 453 U.S. 490 (1981).

The critical assumption of the four-part test is that the government—not the party whose speech the government seeks to inhibit—bears the burden of proof under *Central Hudson*. The assignment of this burden to the government was implicit in *Central Hudson*. ("In the absence of a *showing* that more limited speech regulation

[3] In *S.U.N.Y. v. Fox*, the Court adopted a modified application of the fourth prong of the *Central Hudson* test. While affirming *Central Hudson*'s requirement that the restrictions be "narrowly tailored," the Court held in *S.U.N.Y. v. Fox* that the "fit" between the legislature's ends and the means chosen to accomplish them, must be reasonable and the cost "carefully calculated." Moreover, the scope of the restrictions must be "in proportion to the interest served," *S.U.N.Y. v. Fox*, 492 U.S. at 480, citing *In re R.M.J.*, 455 U.S. 191, 203 (1982).

would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.") 447 U.S. at 571 (emphasis added). Since *Central Hudson*, the Court has repeatedly reiterated that government bears this burden.

Most recently, in *Peel v. Attorney Disciplinary Comm'n*, the Court noted the "constitutional presumption favoring disclosure over concealment" and the government's burden of rebutting this presumption. *See Peel*, 496 U.S. at 111. The Court in *Peel* recognized the government's "heavy burden" of justifying its prohibition of accurate factual information. *Id.* at 109.

Indeed, placement of this burden upon the government is the *sine qua non* of the First Amendment ("Congress shall make no law. . . .") and fully consistent with other First Amendment cases where the government has sought suppression of fully protected speech. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958). *See also S.U.N.Y. v. Fox*, 492 U.S. at 480 ("State bears the burden of justifying its restrictions" and must "affirmatively establish" the reasonable fit). As the Court stated in *Zauderer*, 471 U.S. at 647:

> [T]he burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest. . . .

Thus, consistent with another basic assumption under the First Amendment that some accurate information is always better than none at all, *Central Hudson*, 447 U.S. at 562, it is the *government* which must come forward to demonstrate why speech that is neither false, misleading, nor illegal should be suppressed.

B. The Statutes at Issue, as Applied to Edge Broadcasting, Fail the *Central Hudson* Test.

The restrictions challenged by the Respondent, 18 U.S.C. §§ 1304 and 1307, as applied to Respondent, are

not a "narrowly tailored fit" and fail to "directly advance" the governmental interest asserted. This application of the regulations thus fails both the third and fourth prongs of the *Central Hudson* test and consequently is unconstitutional.

Sections 1304 and 1307 lack any semblance of the narrow tailoring required by *S.U.N.Y. v. Fox*. The government's asserted objectives are to discourage lottery participation in States that do not sponsor lotteries, while accommodating lottery participation in States that do. Brief for Petitioners at 31. Essentially, the statute's asserted goal [4] is to reduce the volume of lottery advertising in states such as North Carolina and permit virtually unlimited promotion of such advertising in states such as Virginia. A "tailored" regulation would need to focus, at least to some extent, on whether application of the regulation directs lottery advertising to the appropriate *audience*. Only by drawing some link between the lottery advertising at issue and the ultimate audience or destination, would one hope to achieve the desired objective.

As the Petitioners have repeatedly stressed, however, §§ 1304 and 1307 create a "bright-line geographic rule" under which a "station's right to broadcast lottery advertising hinges on the State to which it is licensed." Brief for Petitioners at 2. The "bright-line" nature of the regulations may have made them relatively easy to draft or apply, but they are hardly "tailored" to achieve the

[4] The government has assumed *a fortiori* that by reducing the lottery advertising reaching citizens of non-lottery states, the interest of non-lottery state citizens in gambing will be reduced. The paternalistic reasoning underlying this assumption, conflicts with the constitutional presumption in favor of more speech, as discussed above. Moreover, it rests on the dubious belief that the best way to "guide" citizens in their economic and public policy choices is to deprive them of "immoral" information. Aside from obvious First Amendment concerns, this belief is unsupported by any shred of empirical evidence.

asserted goals.[5] Unlike the statute upheld in *Posadas*, which at least attempted to focus its restrictions on the nature of the audience, the impliedly vulnerable citizens of Puerto Rico,[6] the statutes challenged here focus only on the state in which the station's broadcast frequency is licensed, totally without regard to the actual physical location of the entity broadcasting the advertisement, the reach of its signal, or the advertisement's ultimate audience.

The effect of these "bright-line" regulations is that by focusing only on the physical locale of the broadcaster's license, they cast a net that is not only far too wide, but is also ineffective, in violation of both the third and fourth prongs of *Central Hudson*. The effect of the regulations is to permit listeners to be deprived of lottery advertising who should not be, while allowing other listeners in non-lottery states to hear lottery advertising, solely because of the physical location of the broadcasting source. Any law that sweeps this broadly and blindly on the facts of this case cannot meet the standards of the fourth prong of *Central Hudson*.

[5] As expressed by Justice Marshall in his concurrence in *Peel*, 496 U.S. at 117, n.1:

> this Court's primary task in cases such as this is to determine whether a state law or regulation unduly burdens the speaker's exercise of First Amendment rights, not whether respect for those rights would be unduly burdensome for the State.

[6] The Court in *Posadas* accorded special deference to Puerto Rico law and culture, 478 U.S. at 339, n.6:

> A rigid rule of deference to interpretation of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. *See Diaz v. Gonzalez*, 261 U.S. 102, 105-106 (1923) [parallel citations omitted] (Holmes, J.). ("This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concerns. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here.").

See also Posadas, 478 U.S. at 332-336.

Not surprisingly, the "bright-line" regulations challenged by the Respondent also fail to "directly advance the governmental interest asserted," as required by the third prong of *Central Hudson*. *See Central Hudson*, 447 U.S. at 566. Rather than decreasing lottery advertising in North Carolina and permitting maximum promotion in Virginia, the regulations as applied to the Respondent have an almost *contrary* effect: the prohibition has little, if any, effect of discouraging lottery participation in North Carolina, and does nothing to accommodate the promotion of lottery participation in Virginia. Assuming again that there is a link between increasing or decreasing advertising and increasing or decreasing the public's interest in state lotteries, the direct effect of the regulations here has been very different from what the government argues was intended.

Respondent's radio station, WMYK (promoted and known as "Power 94"), reaches listeners who are primarily in Virginia. In fact, 92.2% of Power 94's listeners live in Virginia and only 7.8% live in North Carolina. *See Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 639-641 (E.D. Va. 1990). By prohibiting Respondent from broadcasting Virginia State lottery information, the statute deprives Virginia residents of the opportunity to hear promotions for their state-sponsored lottery—the opposite effect of what the statute was allegedly supposed to "accommodate" for one of the now numerous state-sponsored lotteries.

Have the regulations "directly advance[d]" the government's other asserted interest in discouraging the public's interest in gambling by reducing North Carolinians' knowledge of the Virginia lottery? The district court found that they have not. *See Id.* Power 94's broadcast reaches only nine counties in North Carolina, the total population of which is 127,000. The effect of preventing Power 94 from broadcasting lottery advertisements, however, has had only a minimal effect on even

these 127,000 residents. As the district court noted, most residents in Power 94's nine county service area already listen to broadcasts of Virginia-based radio stations, view Virginia-based television, and read Virginia newspaper advertising. *See Id.* at 640. Thus, residents in Power 94's service area receive a heavy volume of Virginia lottery advertisements despite the statute's prohibition of their being broadcast by Power 94. As the district court found: "38% of the radio listening in the Power 94 service area is directed at stations which broadcast lottery advertising." *Id.* This accounts only for the lottery advertising that reaches residents in Power 94's area by *radio*; it does not include the number of residents in Power 94's area who receive other forms of lottery advertising. The district court squarely found that the residents in Power 94's service area receive "most of their radio, newspaper and television communication from Virginia-based media," rendering any "advance" achieved by the statute marginal at best. *Id.* at 639.

Central Hudson and its progeny make clear that a regulation does not "directly advance" the governmental interest "if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. And, while the government may argue that there may be a few North Carolina residents who are completely insulated from lottery advertising as a result of the prohibition on Power 94's broadcasting, the Court has stated that "conditional and remote eventualities simply cannot justify silencing . . . promotional advertising." *Id.* at 569. *See also Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 73 (statute fails third prong of *Central Hudson* test where it "provides only the most limited incremental support for the interest asserted."). Attempts to justify the ineffectiveness and loosely-tailored nature of the restrictions here as the "only means"—or even as a rational means—of effectuating the asserted governmental interests should be rejected out of hand.

III. PETITIONERS' RELIANCE ON *POSADAS* IS MISPLACED.

The government attempts to draw analogies from *Posadas* to the situation presented in this case. *Posadas*, however, does not relieve the government of its failure to meet the burden imposed by *Central Hudson*. The appellee in *Posadas*, Tourism Company of Puerto Rico, demonstrated to the Court's satisfaction that it complied with the four prongs of the *Central Hudson* test. The Petitioners must meet this same burden here. In addition, although *Posadas* may have factual similarities to this case, it is distinguishable, as discussed below. Also, Petitioners rely primarily on statements made in dictum in *Posadas*, which not only lack precedential value, but are based on reasoning that has been roundly criticized by First Amendment scholars and judges.

A. Petitioner's Cited Dictum From *Posadas* Is at Odds With Basic Principles of the First Amendment.

Petitioners rely heavily on an observation made in *Posadas* that it would be:

> a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Posadas, 478 U.S. at 346.

The reasoning of this dictum, however, has been sharply questioned.[7] In his dissenting opinion, Justice

[7] *See, e.g., Posadas*, 478 U.S. 328, 355 n.4 (J. Brennan, dissent); Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing; 'Twas Pitiful, 'Twas Wondrous Pitiful."*, 1986 *Sup. Ct. Rev.* 1, 12-13 (Court's statement violates "every notion of what the Free Speech Clause has stood for" and is a "perversion of First Amendment law"); Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 *Virginia Law Review* 627 (May, 1990) ("[I]t is not clear that the power to regulate a specific economic activity necessarily comprises the power to regulate speech about that activity. After all, the Constitution does not forbid legislation abridging the freedom of gambling; it does forbid legislation abridging the freedom of speech.")

Brennan had the following response to Chief Justice Rehnquist's statement in the majority opinion:

> [T]he "constitutional doctrine" which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment.

Posadas, 478 U.S. at 354, n.4 (J. Brennan, dissenting).

A cursory review of the *Posadas* opinion shows that the cited statements are dicta. Indeed, the Court in *Posadas* affirmed the continuing vitality of *Central Hudson* and applied its four-part test in concluding that the unique Puerto Rico statute at issue "pass[ed] muster under each prong of the *Central Hudson* test." *Posadas*, 478 U.S. at 340-344. It was on this basis that the Court then stated: "We therefore *hold* that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim." *Id.* (emphasis added).

It is in the paragraphs following this holding that the observations occur which are now cited and relied upon by the government as the linchpin of its First Amendment argument to this Court. *See Id.* at 345-346. The statements are dicta, and rest upon reasoning that is at fundamental variance with First Amendment jurisprudence.

The cited dictum is problematic for several reasons. First, the constitutional doctrines and tests for determining whether speech can be regulated are distinct from and far more stringent than those for determining whether activities can be prohibited or regulated. If actually accepted as a part of First Amendment doctrine, the statement would turn the question of whether a par-

ticular form of speech can be regulated into whether the *activity* which the speech concerns can be regulated. Blending these separate analyses into one would eradicate the First Amendment's protection of commercial speech, not just about state lotteries but about a virtually unlimited range of products and services. Permissible government regulation reaches practically every aspect of life, and therefore most commercial speech could be characterized as having a potential impact on the demand for or the acceptability of a regulable product or activity. If this were the rule, commercial speech protection would be reduced to a nullity. As Professor Kurland argued:

> If all that is needed to erase the protections that Cardozo once described as fundamental to our liberties is to subsume speech under actions, our liberties are truly endangered.

Kurland, *Posadas de Puerto Rico*, 1986 *Sup. Ct. Rev.* at 14.

When carried to its logical extreme and applied to a legion of different products and activities, the radical nature of this reasoning becomes clear: For example, municipalities surely have the right to regulate the height of buildings and often, in fact, prohibit the activity of building tall buildings. Under the Court's logic, since city X *could* ban tall buildings altogether, it could prohibit a newspaper from carrying a contractor's advertisement discussing the contractor's ability to build tall buildings.

Essentially, if the Court were to merge the unrelated and incomparable analyses for the regulation of speech and products or activities, the Court would effectively wash its hands of the protection of commercial speech, leaving it to legislative mercy rather than to the constitutional oversight of the courts. Simply put, the protection of a given form and topic of commercial speech would depend not on First Amendment principles, but upon determination by legislators as to which activities may

be prohibited or regulated, with speech regulation relegated to being the tail of the dog.[8]

Further, under a related *Posadas* dictum, also relied on by Petitioners. *see* Brief for Petitioners at 40, n.19, only if the underlying product or activity is "constitutionally protected" can one be assured that related commercial speech will not be prohibited.[9] Any category of

---

[8] Justice Stevens reiterated the importance of court review of legislative restriction of commercial speech for the plurality in *Peel*, 496 U.S. at 108-109:

> Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise de novo review. *Cf. Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 498-511 [parallel citations omitted] (1984). That the judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity. *See e.g., Baird v. State Bar of Ariz.*, 401 U.S. 1 [parallel citations omitted] (1971). The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 [parallel citations omitted]; *Central Hudson Gas & Electric Corp.*, 447 U.S. at 562 [parallel citations omitted]. Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden to justify a categorical prohibition against the dissemination of accurate factual information ot the public.

[9] Petitioners cited the following statement in *Posadas*:

> We think appellant's argument ignores a crucial distinction between the *Carey* and *Bigelow* decisions in the instant case. In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the state. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely

"constitutionally protected" products or services would be problematic and at best narrow in scope. Perhaps religious literature, contraception and abortion services would qualify currently, but even those may depend on shifting constitutional doctrines. The concept underlying both of these *Posadas* dicta appears to be that commercial speech can be "immoral" or lead to "undesirable" conduct; lottery advertising may encourage citizens to gamble or behave in some other way that the government believes is not in their best interest. This line of thinking directly conflicts with the First Amendment's fundamental respect for individual choice and for citizens' *ability* to make choices. In another context, the Court has developed the "clear and present danger" doctrine to address "dangerous" speech. To allow the prohibition of speech about legal products that may lead to what some may consider immoral conduct, would undermine and substantially shrink the First Amendment.

B. *Posadas* Involved a Facial Challenge, Whereas the Instant Case Challenges the Statute As Applied.

Respondent Edge Broadcasting, has successfully challenged 18 U.S.C. §§ 1304 and 1307 *as applied* to it alone. It is not challenging the statute facially as it may potentially be applied to others. Unlike Edge Broadcasting, the appellant in *Posadas* brought a *facial* challenge to the Puerto Rico ordinance. The burden of making a successful facial challenge under the First Amendment is much more stringent, and the chance of prevailing is consequently lower, than in an as-applied challenge involving the same facts. *Cf. S.U.N.Y. v. Fox*, 492 U.S. at 482-485.

---

ban casino gambling necsesarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.

Posadas, 478 U.S. at 345-346.

A petitioner challenging a statute as applied to it, need only show that its acts "fall outside what a properly drawn prohibition would cover." *Id.* at 482. An appellant seeking to prove that a statute is unconstitutional on its face must demonstrate that "the statute's overreach is *substantial*, not only as an absolute matter," but also as compared with the legitimate applications of the statute. *Id.* at 485 (emphasis in original); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The implications of this difference in the context of *Posadas* are evident: because an appellant failed to meet the higher burden of proving that a statute was unconstitutional on its face, does not demonstrate that another appellant should not prevail when seeking only to distinguish a speech ban applicable to it from the broader purpose of the statute, under the applicable First Amendment test. Put differently, despite the fact that the appellant in *Posadas* was unable to prevail on its facial challenge, another casino operator in Puerto Rico might be entitled to a different result in a challenge to the statute as applied.

C. The Statute at Issue in *Posadas* Was Held To Be Narrowly Tailored to Its Intended Audience.

Unlike §§ 1304 and 1307, the statute at issue in *Posadas* as finally interpreted by the Puerto Rico courts, at least attempted to serve a governmental interest in reducing local citizen participation in Puerto Rico's casino gambling. The statute prohibited casino advertisements targeted at citizens of Puerto Rico but permitted advertisements targeted at nonresident tourists.[10] The governmental interests asserted in this case by the government are that of "discouraging lottery participation in the States that do not sponsor lotteries *and* accommodating lottery participa-

---

[10] Again note the special deference afforded "unique" Puerto Rican law and culture in *Posadas*. *See* fn. 6, *supra* at 13. This is another distinguishing feature of that case.

tion and promotion in the States that do." Brief for Petitioners at 31 (emphasis in original). To this end, 18 U.S.C. §§ 1304 and 1307 prohibit lottery advertisements to be broadcast from a state that does not sponsor lotteries but permit lottery advertisements to be broadcast into a non-lottery state from a lottery-sponsoring state.

Both sets of statutes seek to limit what reaches the ears of a particular group by prohibiting advertising. However, whereas the Puerto Rico statute at least focuses on what is being directed towards residents of Puerto Rico while encouraging the flow of lottery promotion to non-resident tourists, the statute before the Court in the present case focuses only on the physical location of the entity broadcasting the advertisement, without any regard for the intended audience, which leads to the bizarre and unconstitutional results in this case.

IV. THE GOVERNMENT'S PROCLIVITY TO EXPAND ITS REGULATORY ROLE AT THE EXPENSE OF PROTECTED SPEECH SHOULD BE RESISTED.

In its recounting of the rollercoaster history of congressional expansion and contraction of the Anti-Lottery Act of 1890 ("the Act") and subsequent related statutes, *see* Brief for Petitioners at 15-18, the government cites two cases whose parallel histories—not included by Petitioners—reveal the consistently aggressive posture taken by the United States in asserting the broadest possible applicability of the Act, and its disregard for fundamental First Amendment constraints in this context. In each case, the government's position engendered a dissent from this Court's per curiam decision that subsequent congressional enactments had rendered moot the government's appeal from a lower court decision imposing First Amendment limits on the scope of federal power under the Act.

In *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3rd Cir. 1974) (en banc), *cert. granted*, 417 U.S. 907 (1974), *vacated and remanded*, 420 U.S. 371 (1975), the circuit court concluded that § 1304 of the Act could not be constitutionally applied under the First Amendment to ban broadcasting news reports of lottery winners:

> The contention that . . . the winning number in the New Jersey Lottery is not "news", in a broadcast context, is simply frivolous. . . . The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news. . . .

491 F.2d at 222. However, the United States petitioned for certiorari, which was granted. *See* 417 U.S. 907 (1974). Subsequently, Congress passed § 1307 of the Act, which excludes information about certain legal state lotteries from § 1304. On that basis, this Court remanded the case to the circuit court to determine whether the matter was moot. *United States v. New Jersey Lottery Comm'n*, 420 U.S. 371 (1975). Justice Douglas dissented, stating, in part:

> With all respect, I do not believe that this case has become moot—certainly not for the reasons intimated by the Court. The First Amendment provides that Congress shall make no law abridging the freedom of the press. It is to me shocking that a radio station or a newspaper can be regulated by a court or by a commission, to the extent of being prevented from publishing any item of "news" of the day. So to hold would be a prior restraint of a simple and unadulterated form, barred by constitutional principles. Can anyone doubt that the winner of a lottery is prime news by our press standards?

420 U.S. at 374.

In a strikingly similar situation, the federal district court in Minneapolis held that § 1302 of the Act was impermissible under the First Amendment as applied to prize lists in news reports. *Minnesota Newspaper Ass'n v. Postmaster General*, 667 F. Supp. 1400 (D. Minn.

1987), *vacated*, 490 U.S. 225 (1989). The district court permanently enjoined the United States from further enforcement of the restriction on prize lists as an impermissible prior restraint on the editorial decision making process.

> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 1010 (1940)). The interests here asserted do not justify imposing the fear of subsequent punishment on an editor who decides to publish a lottery prize list. "The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 358 [parallel citations omitted] (1974).

677 F. Supp. at 1407. After the district court decision, Congress passed legislation changing the scope of § 1302, and the plaintiff newspaper association dismissed its appeal to this Court challenging § 1302 under the commercial speech doctrine of the First Amendment. *See* 488 U.S. 815 (1988). However, the United States declined to dismiss its cross-appeal, ultimately requiring this Court to hold that the government's case had been mooted by Congress' action. *Frank v. Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989). Justice Stevens, in an opinion parallel to Justice Douglas' dissent in *New Jersey State Lottery Comm'n v. United States*, dissented:

> In my opinion the Government's concession is a reason for affirming, rather than vacating the judgment of the District Court insofar as it enjoins the Postmaster General from enforcing § 1302 [18 USCS § 1302] as applied to prize lists. I therefore respectfully dissent.

490 U.S. at 227. As these two cases indicate, and as is further evidenced by the present case, Petitioner United States has been exceedingly slow to recognize clear First Amendment constraints on the exercise of legislative and regulatory power over lottery speech, commercial or noncommercial, imposed by the unambiguous precedents of this Court.

It is striking that three different government entities, including the United States, have successfully petitioned for certiorari in three separate commercial speech cases this term, in each case seeking a narrow reading of the *Central Hudson* four-part test. We respectfully submit that this Court should carefully consider the collective implications of these cases under the First Amendment.

In *City of Cincinnati v. Discovery Network, Inc.*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, —— U.S. ——, 112 S. Ct. 1290 (1992), the City of Cincinnati asserts that Part Four ("least restrictive fit") of *Central Hudson* was improperly applied by the Sixth Circuit, and asks that this Court dilute its interpretation of Part Four in *S.U.N.Y. v. Fox*, to require only a "sufficient basis" for government's "believing" that its goals of aesthetics and safety could be met by the commercial handbill ban.

In *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *cert. granted*, —— U.S. ——, 112 S. Ct. 2272 (1992), the State of Florida petitioned for certiorari in a case in which the Circuit held that the State's ban on in-person solicitation by CPA's was not a sufficiently narrowly tailored "fit" under *S.U.N.Y. v. Fox*, and that the State had failed its constitutional burden of showing that existing regulatory requirements were not sufficient to serve that interest. The State's petition argued flatly that Part Four should require only that the State's concerns (policing the professions and protecting the public's ability to rely on the objectivity of CPA's) be advanced in a rational way by the regulation.

This instant case is therefore only the latest example of aggressive governmental attack on the substance of the *Central Hudson* test. If the positions argued by Petitioners in any of these three cases were to be accepted uncritically by the Court, the constitutional balance crafted by the Court in *Central Hudson*, and reiterated by the Court not only in *Posadas*, but also in its post-*Posadas* decisions in *Shapero*, *S.U.N.Y. v. Fox*, and *Peel*, would have little remaining substance, and the Court's commercial speech doctrine would have no remaining force as an effective limit on government regulation of advertising speech.

CONCLUSION

Amici Curiae respectfully submit that Respondent's case for as-applied unconstitutionality of 18 U.S.C. §§ 1304 and 1307 is compelling; it is hard to conceive of a stronger factual record. We urge this court to affirm the decision below, and to reaffirm constitutional protection for commercial discourse in our society.

Respectfully submitted,

P. CAMERON DEVORE *
MARSHALL J. NELSON
SIMA F. SARRAFAN
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

Of Counsel:

HENRY L. BAUMANN
Executive Vice President
and General Counsel
STEVEN A. ROOKSHESTER
Associate General Counsel
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 "N" Street, N.W.
Washington, D.C. 20036
Attorneys for National Association of Broadcasters

JOHN KAMP
AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES, INC.
1899 L Street, N.W.
Washington, D.C. 20036
Attorney for American Association of Advertising Agencies, Inc.

STEVEN R. SHAPIRO
JOHN A. POWELL
AMERICAN CIVIL LIBERTIES UNION
132 West 43 Street
New York, NY 10036
Attorneys for American Civil Liberties Union

STUART D. KARLE
DOW JONES & COMPANY, INC.
200 Liberty St.
New York, NY 10028
Attorney for Dow Jones & Company, Inc.

BARBARA W. WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
Attorney for Gannett Co., Inc.

VICTOR F. GANZI
ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Ave.
New York, NY 10019
Attorneys for The Hearst Corporation

KENNETH M. VITTOR
SLADE R. METCALF
C/O MAGAZINE PUBLISHERS OF
AMERICA, INC.
575 Lexington Ave.
New York, NY 10022
Attorneys for Magazine Publishers of America, Inc.

RICHARD E. WILEY
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 "K" Street, N.W.
Washington, D.C. 20006
Attorneys for The Media Institute

DAVID P. FLEMING
Vice President and General
Counsel
MULTIMEDIA BROADCASTING
COMPANY
701 E. Douglas, Union Station
Wichita, KS 67202
Attorney for Multimedia Broadcasting Company

ROBERTA R. BRACKMAN
NATIONAL BROADCASTING
COMPANY, INC.
30 Rockefeller Plaza
Room 1022
New York, NY 10112
Attorney for
National Broadcasting
Company, Inc.

JOHN F. STURM
RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF
AMERICA
11600 Sunrise Valley Dr.
Reston, VA 22091
Attorneys for Newspaper
Association of America

WADE H. HARGROVE
MARK J. PRAK
THARRINGTON, SMITH & HARGROVE
209 Fayetteville Street
Raleigh, N.C. 27602
Attorneys for North Carolina
Association of Broadcasters,
Inc.

L. STANLEY PAIGE
POST-NEWSWEEK STATIONS, INC.
1150 15th Street, N.W.
Washington, D.C. 20071
Attorney for Post-Newsweek
Stations, Inc.

MICHAEL B. ISAACS
PROVIDENCE JOURNAL COMPANY
75 Fountain St.
Providence, RI 02902
Attorney for Providence
Journal Company

BRUCE W. SANFORD
HENRY S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
Washington Square
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for the Society of
Professional Journalists

HARRY M. JOHNSTON III
TIME INC.
1271 Avenue of the Americas
New York, NY 10020
Attorney for Time Inc.

DAVID D. HILLER and
CHARLES J. SENNET
TRIBUNE COMPANY
435 North Michigan Ave.
Suite 2010
Chicago, IL 60611
Attorneys for Tribune Company

MARTIN P. MESSINGER
BRYAN T. MCGINNIS
WESTINGHOUSE BROADCASTING
COMPANY, INC.
888 Seventh Ave., 39th Floor
New York, NY 10106
Attorneys for
Westinghouse Broadcasting
Company, Inc.

APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The National Association of Broadcasters ("NAB"), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information about the activities of government and other matters of public interest and concern, including advertising and other commercial information.

The American Association of Advertising Agencies ("A.A.A.A.") is a national trade association organized under the laws of the State of New York. A.A.A.A.'s membership is comprised of over 730 advertising agencies doing busiess throughout the United States. A.A.A.A. members create and place some 80 percent of all national advertising and substantial amounts of local and regional advertising. In addition, A.A.A.A. members provide a full range of marketing services to their clients, including product promotion, public relations, direct marketing, merchandising, design and packaging services. A.A.A.A. is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Since its founding in 1920, the ACLU has consistently maintained that the First Amendment protects the free exchange of information between willing speakers and willing listeners, and has articulated that view in numerous appearances before this Court, both as direct counsel and as *amicus curiae*. Because this case involves a government effort to restrict the flow of truthful information to the

general public, it raises issues of direct concern to the ACLU and its members.

Dow Jones & Company, Inc., publishes, *inter alia*, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, *the Dow Jones News Services*, and, through its Ottaway Newspapers, Inc., subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified, privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications, hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

Gannett Co., Inc., is a nationwide news and information company that publishes 82 daily newspapers (including USA TODAY), a variety of non-daily publications (including USA Weekend, a newspaper magazine) and operates 10 television stations, 15 radio stations, a national news service and an outdoor advertising company.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 196 domestic magazine publishers who publish over 800 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news and publish weekly, bi-weekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people, many of which publications carry substantial advertising content.

The Media Institute is a nonprofit, tax-exempt research foundation dedicated to promoting First Amendment protection for commercial speech, safeguarding of strong First Amendment protections in the laws and regulations

dealing with communications technologies, and preserving a robust, competitive, and unfettered press, both electronic and print.

Multimedia Broadcasting Company owns and operates television and radio stations in various markets throughout the country which engage in the sale of advertising.

National Broadcasting Company, Inc., itself and its subsidiaries, own and operate a national television network and television stations, all of which are engaged in the gathering and dissemination of news and advertising to the public.

The Newspaper Association of America ("NAA") represents approximately 1,525 daily newspapers representing more than 90% of the newspaper circulation in the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

The North Carolina Association of Broadcasters, Inc. ("NCAB") is a nonprofit corporation whose membership consists of some 200 radio and television stations located in North Carolina. As the only statewide trade association representing the broadcast industry in North Carolina, NCAB is interested, among other things, in issues relating to the ability of its members to broadcast advertisements relating to matters of commercial interest to the public.

Post-Newsweek Stations, Inc., through wholly-owned corporate subsidiaries, owns and is licensee of four network affiliated television stations: WDIV, Detroit, Michigan; WFSB, Hartford, Connecticut; WJXT, Jacksonville, Florida; and WPLG, Miami, Florida. Each of the governments in those states operates and advertises its state lottery.

Providence Journal Company owns and operates nine broadcast television stations; through its subsidiaries Colony Communications, Inc. and King Videocable Com-

pany operates cable television systems serving approximately 770,000 subscribers in nine states; and publishes newspapers in Providence, R.I. collectively known as The Journal-Bulletin.

The society of Professional Journalists, a voluntary, nonprofit organization, is the largest and oldest organization of journalists in the United States. Its members represent every branch and rank of print and broadcast journalism.

Time Inc. is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE, and ENTERTAINMENT WEEKLY.

Tribune Company is a communications company owning the *Chicago Tribune*, Orlando *Sentinel*, the Ft. Lauderdale *Sun-Sentinel*, the Escondido, California *Times-Advocate*, the Palo Alto *Times-Tribune*, the Newport News, Virginia *Daily Press*, television stations in Chicago, New York, Los Angeles, Denver, Atlanta, New Orleans and Philadelphia, and radio stations in Chicago, New York, Denver and Sacramento.

Westinghouse Broadcasting Company, Inc. is a diversified media company which, through its Group W Television and Group W Radio subsidiaries, is the licensee of five television stations and sixteen radio stations in major markets, and, through its Group W Satellite Communications subsidiary, is a national distributor of cable television programming. Group W station programs and Group W cable programs frequently include state lottery information or advertisements, or other promotional programming subject to state and federal regulation.